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tatus: GRANTED

ocketed:
ugust 5, 1985

Title: Celotex Corporation, Petitioner
v.
Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, deceased

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Parks, H. Emslie

Counsel for responcent: Nicholl, Peter T., Smith, Paul M.

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Aug 5 1985 | G | Petition for writ of certiorari filed. |
| 2 | Sep 4 1985 | | DISTRIBUTED. September 30, 1985 |
| 3 | Sep 4 1985 | X | Brief of respondent Myrtle Catrett in opposition filed. |
| 5 | Oct 7 1985 | | REDISTRIBUTED. October 11, 1985 |
| 7 | Oct 15 1985 | | REDISTRIBUTED. October 18, 1985 |
| 9 | Oct 21 1985 | | REDISTRIBUTED. November 1, 1985 |
| 10 | Nov 4 1985 | | Petition GRANTED. |
| | | | ********** |
| 12 | Dec 9 1985 | | Order extending time to file brief of petitioner on the merits until December 27, 1985. |
| 13 | Dec 23 1985 | G | Motion of Motor Vehicle Manufacturers Association of the United States, Inc., et al. for leave to file a brief as amici curiae filed. |
| 14 | Dec 26 1985 | | Joint appendix filed. |
| 15 | Dec 26 1985 | | Brief of petitioner Celotex Corp. filed. |
| 16 | Dec 20 1985 | | Record filed. |
| 18 | Jan 6 1986 | | Order extending time to file brief of responcent on the merits until February 8, 1986. |
| 19 | Jan 13 1986 | | Motion of Motor Vehicle Manufacturers Association of the United States, Inc., et al. for leave to file a brief as amici curiae GRANTED. |
| 20 | Feb 4 1986 | | SET FOR ARGUMENT, Tuesday, April 1, 1986. (2nd case) |
| 21 | Feb 7 1986 | | Brief of respondent Myrtle Catrett filed. |
| 22 | Feb 21 1986 | | CIRCULATED. |
| 23 | Mar 24 1986 | X | Reply brief of petitioner Celotex Corp. filed. |
| 24 | Apr 1 1986 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

85-198

No.

Supreme Court, U.S.
FILED
AUG 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

JOHNS-MANVILLE SALES CORPORATION, ET AL.,
*Petitioners,*

v.

MYRTLE NELL CATRETT, ADMINISTRATRIX OF THE ESTATE OF LOUIS H. CATRETT, DECREASED,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the moving party, on a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure, must support its Motion with some evidence even though the opposing party has no admissible evidence with which to support its claim.

2. Whether Rule 56 of the Federal Rules of Civil Procedure permits a party to oppose a Motion for Summary Judgment with inadmissible evidence.

## PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit (No. 83-1694) were Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, Deceased, and The Celotex Corporation, a wholly-owned subsidiary of Jim Walter Corporation, which is traded on the New York Stock Exchange.

Armstrong World Industries, Inc. (formerly Armstrong Cork Company) and Turner & Newall, Ltd. were originally parties to the appeal from the United States District Court, but settled prior to oral argument before the United States Court of Appeals, and have no interest in the outcome of the petition.

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No.

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JOHNS-MANVILLE SALES CORPORATION, ET AL.,
*Petitioners,*

v.

MYRTLE NELL CATRETT, ADMINISTRATRIX OF THE ESTATE OF LOUIS H. CATRETT, DECREASED,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Celotex Corporation respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 756 F.2d 181 and appears as Appendix A to this Petition.

The District Court's ruling granting summary judgment to Petitioner was issued from the bench during oral argument and is unreported. The transcript is attached hereto as Appendix B. A copy of the District Court's Order is attached as Appendix C.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1985. On May 7, 1985, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing *En Banc* filed by Petitioner. Appendix D and Appendix E. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure. Rule 56 is set forth in Appendix F.

## STATEMENT OF THE CASE

On September 2, 1980, Myrtle Nell Catrett, widow of Louis H. Catrett and Administratrix of his estate, filed a wrongful death and survival action in the United States District Court for the District of Columbia against fifteen corporate defendants. The complaint was based on negligence, breach of warranty, and strict liability.

Mrs. Catrett alleged that as a result of Louis Catrett's exposure, during his career as an asbestos insulator, to products containing asbestos manufactured or distributed by the defendants, Louis Catrett contracted malignant peritoneal mesothelioma and died on September 3, 1979.

On September 28, 1981, The Celotex Corporation (Celotex) filed a Motion for Summary Judgment, including a Statement of Material Facts and a Memorandum of Points and Authorities. Celotex withdrew its Motion for



Summary Judgment on November 9, 1981, and subsequently refiled its Motion for Summary Judgment, including a Statement of Material Facts and a Memorandum of Points and Authorities, on December 23, 1981.

The basis for Celotex's motion was that Mrs. Catrett had failed to produce evidence that any Celotex product was the proximate cause of Louis Catrett's death and that Mrs. Catrett could not show that Mr. Catrett had been exposed to Celotex's products within the jurisdictional limits of the district court. Celotex pointed to Mrs. Catrett's failure to identify Celotex's products in her answers to the joint interrogatories from all defendants to plaintiff, and to Mrs. Catrett's failure to respond to Celotex's supplemental interrogatories, as the basis for its contention that plaintiff could not prove that Mr. Catrett had been exposed to Celotex's products.

Mrs. Catrett responded on January 4, 1982 by filing a Motion and Memorandum in opposition to Celotex's Motion for Summary Judgment. In her response, Mrs. Catrett produced, for the first time, three documents which she contended could be used to establish Mr. Catrett's exposure to Celotex's products. The documents were (1) a letter to Mr. Catrett's attorney from a Claim Representative at Aetna Casualty and Surety Company, (2) a letter from one of Mr. Catrett's employers to a Claim Representative at Aetna Casualty and Surety Company, and (3) deposition testimony of Mr. Catrett, taken during his workmen's compensation proceeding. Mrs. Catrett contended that these documents were exceptions to the hearsay rule and could be used to prove that Mr. Catrett had been exposed to Celotex's products.

On July 21, 1982, the District Court, ruling from the bench, granted Celotex's Motion for Summary Judgment holding that there was no showing that Mr. Catrett had been exposed to Celotex's products in the District of Columbia or elsewhere. Appendix B at 29a.

On June 16, 1983, Mrs. Catrett filed a Notice of Appeal with the Clerk of the United States District Court for the District of Columbia, appealing the Orders granting summary judgment in favor of Celotex and Armstrong World Industries, Inc. and granting Turner & Newall, Ltd.'s Motion to Dismiss for Lack of Personal Jurisdiction.

Mrs. Catrett did not challenge the dismissal of the other twelve Defendants, and settled with Armstrong World Industries, Inc. and Turner & Newall, Ltd. prior to the oral argument on appeal.

## THE DECISION BELOW

On appeal, the District of Columbia Circuit reversed, holding that Celotex's "moving papers were patently defective on their face, rendering inappropriate the grant of summary judgment on the record as it stood before the District Court." *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985), App. A at 5a-6a. Thus the Court did not reach the evidentiary issue.

The Court determined that Celotex merely pointed to Mrs. Catrett's inability to produce evidence to support her claim, and that Celotex offered no affidavits, declarations or evidence of any sort to support its motion. Thus, the Court held that Mrs. Catrett need not come forward with evidence to oppose Celotex's motion.

In support of its position, the majority relied upon "a long, unbroken line of precedent," 756 F.2d at 186, App. A at 10a, holding that summary judgment is not proper absent a properly supported motion. However, the Court expressly failed to state what showing would have been adequate to meet Celotex's burden. *Id.* at 185 n.13, App. A at 9a.



Judge Bork, dissenting, would have affirmed Celotex's summary judgment, under several principles of summary judgment law. First, he argued by analogy to a motion for directed verdict, that since Mrs. Catrett could not survive a directed verdict at trial, then summary judgment is proper. Additionally, since a trial judge can grant summary judgment *sua sponte* whenever it concludes that required evidence cannot be produced, then a party can obtain summary judgment whenever it brings that situation to the Court's attention. Further, the dissent noted that it is within a trial court's discretion to grant summary judgment where a party cannot show that he has at least minimal evidence to support a case, and "this authority would be mocked if plaintiffs could not be obligated before trial to reveal that they had at least some evidence supporting the essential elements of their lawsuit." *Id.* at 190, App. A at 18a.

Finally, the dissent pointed out that Rule 56 imposes no ironclad requirements, and in fact Rule 56(b) allows for summary judgment on motion without a supporting affidavit. *Id.*, App. A at 19a.

In his conclusion, Judge Bork stated "I understand the judicial impulse to save a plaintiff's case from what may have been careless preparation, but the deformation of summary judgment procedures is too high a price to pay for the gratification of that impulse." *Id.* at 191, App. A at 22a.

On May 7, 1985, the District of Columbia Circuit denied a Petition for Rehearing, Appendix D, and Suggestion for Rehearing *En Banc*, Appendix E.

## REASONS FOR GRANTING THE PETITION

This case merits the Court's review because the majority opinion by the District of Columbia Circuit conflicts with the law of the District of Columbia Circuit and of other Circuits which allow summary judgment where the moving party chooses not to submit any evidentiary support for the summary judgment motion. Further, the majority opinion contradicts established case law of this Court and of the District of Columbia Circuit, in allowing a party to oppose a summary judgment motion with inadmissible evidence.

## ARGUMENT

### I.

### THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION, CONCERNING SUMMARY JUDGMENT PROCEDURE, IN CONFLICT WITH A DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT AND THE THIRD CIRCUIT.

A party moving for summary judgment need not produce evidence to support its motion if the responding party has no admissible evidence on an essential element of its claim. This proposition is supported by case law from the District of Columbia Circuit. In *Reynolds v. Needle,* 132 F.2d 161 (D.C. Cir. 1942), the District of Columbia Circuit Court of Appeals affirmed the district court's grant of summary judgment to the appellee where the appellee based his motion on res judicata and on the statute of limitations, 132 F.2d at 161, yet provided neither affidavits nor supporting materials. *Id.* The Court held that affidavits were not necessary, since the complaint showed, on its face, that the statute of limitations had expired. *Id.* at 162. According to the majority opinion in this case, however, summary judgment would not be proper in *Reynolds* unless the moving party produced some evidence to support its position.



In addition to *Reynolds v. Needle, supra,* the majority's decision is in direct conflict with a decision of the Third Circuit. *In Re Japanese Electronics Products,* 723 F.2d 238 (3rd Cir. 1983) involved an antitrust action by American electronics manufacturers against Japanese electronics manufacturers. In affirming the District Court's grant of summary judgment, the Third Circuit stated:

> "The movant may choose not to submit any evidentiary materials supporting his summary judgment motion." 723 F.2d at 258 (citing *Hubicki v. ACF Industries, Inc.,* 484 F.2d 519, 522 (3rd Cir. 1973).

The language of *In Re Japanese Electronics Products* flatly contradicts the majority's holding in this case.

The majority holds that a party must support a motion for summary judgment with "some evidence." This requirement places an insurmountable burden on the moving party, if, as in the present case, a material fact is plainly undemonstrable. Rule 56(b) of the Federal Rules of Civil Procedure permits a party to "move with or without supporting affidavits for a summary judgment." Further, under Rule 56(c) the moving party is not required to make an evidentiary showing, and, in fact, "a motion for summary judgment may be made wholly on the pleadings." 6 J. Moore, *Moore's Federal Practice* ¶56.11[2] at 209 (1985) (citing *Reynolds v. Needle, supra).* Nonetheless, the majority states that "the motion does, however, require *some* support, and here support was totally lacking." 756 F.2d at 186 n.15, App. A at 10a (emphasis original). The majority has created a new standard in holding that a motion for summary judgment requires "some support."

The restrictive use of summary judgment procedures, such as by the District of Columbia Circuit in this case, has been criticized. *See Lee v. Flintkote Co.,* 593 F.2d 1275, 1282 n.37 (D.C. Cir. 1979). The criticism has focused

on the ambiguity of the burden on the moving party to "show" under Rule 56(c) that it is entitled to judgment:

> ". . . even a party with the burden of proof may avoid a summary judgment without producing any evidence unless his opponent makes a strong evidentiary showing. This conclusion, however, undermines the purpose of the rule, which is to discover whether the parties have enough evidence to justify the time and expense of a trial." Currie, *Thoughts on Directed Verdicts and Summary Judgments,* 45 U. Chi. L. Rev. 72, 78 (1977).

As Judge Bork states in his dissent:

> "More generally, the precedent established today will waste trial court time and energy and unnecessarily add to the costs and procedural burdens faced by litigants." 756 F.2d at 187, App. A at 13a.

The majority opinion is destructive of existing case law and summary judgment procedure because it holds that Celotex's motion for summary judgment is patently defective without some support, yet the majority expressly declines to state "what showing would have been adequate to meet Celotex's burden." *Id.* at 185 n.13, App. A at 9a. The practical effect of the Court's ruling will lead to confusion among trial judges and attorneys involved in summary judgment proceedings as to what showing is now necessary when moving for summary judgment.

A final consideration regarding the practical effect of the Court's decision is that Celotex, and similarly situated parties in asbestos and other product liability actions, are faced with the logical impossibility of "proving the negative." The majority recognizes that "Celotex may have difficulty, to be sure, in 'proving the negative' that Plaintiff's decedent had not been exposed to its products." *Id.* at 184, App. A at 6a. In fact, it is not a "difficulty", it is an impossibility. Unless Celotex could account for every



minute of Louis Catrett's career and for every product with which he worked or was exposed, than Celotex could not meet its burden of "proving the negative". Summary judgment, then, becomes an impossibility, despite Mrs. Catrett's inability to prove her case.

The majority attempts to dispose of the obvious conflict it has created in products liability actions by stating that "no effort was made by Celotex to comply with the requirements of Rule 56." *Id.* at 184 n.9, App. A at 6a. As a practical matter, the majority has made it impossible for a defendant-manufacturer to obtain a summary judgment unless the plaintiff admits outright that he never used or was exposed to the defendant-manufacturer's product. Thus, a plaintiff can now keep a defendant-manufacturer from obtaining summary judgment even where the plaintiff has no evidence upon which to rely at trial to hold the defendant-manufacturer in the case.

## II.

### THE MAJORITY OPINION CONTRADICTS ESTABLISHED CASE LAW HOLDING THAT A PARTY CANNOT OPPOSE SUMMARY JUDGMENT WITH EVIDENCE WHICH WOULD NOT BE ADMISSIBLE AT TRIAL.

It is well established in this Court and in the District of Columbia Circuit that evidence which is inadmissible is not to be considered by the trial judge in ruling on a summary judgment motion. *See, Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970); *Government of Republic of China v. Compass Communications Corp.,* 473 F. Supp. 1306 (D. D.C. 1979); *Continental Casualty Co. v. American Security Corp.,* 443 F.2d 649 (D.C. Cir. 1970), cert. denied, 402 U.S. 907 (1971); 6 J. Moore, *Moore's Federal Practice,* ¶56.11 [1.-8] at 202-206 (1985).

On appeal, Celotex argued that the evidence with which Mrs. Catrett sought to defeat summary judgment was inadmissible, and therefore did not raise a genuine issue as to a material fact. The Majority expressly acknowledged the inadmissibility of Mrs. Catrett's evidence. 756 F.2d at 186, App. A at 10a. However, the majority contradicts firmly established precedent and states "[t]rue, the evidence was not in admissible form, but at least some of the evidentiary infirmity was plainly curable." *Id.* App. A at 10a. As Judge Bork stated in his dissent, "[I]n a departure from the established rules, the majority suggests that the district judge could consider inadmissible evidence of causation because the admissibility problems with the evidence might eventually be cured." *Id.* at 191 n.10, App. A at 21a.

The import of this holding to litigants in summary judgment procedures is twofold. First, a party will no longer be required to produce admissible evidence to withstand a summary judgment attack. Second, a party opposing summary judgment can succeed in its opposition by providing inadmissible evidence, and then attempting to develop admissible evidence prior to trial. As Judge Bork points out, "[T]he majority's holding will inevitably lead to pointless trials where anticipated factual disputes fail to materialize because admissible evidence cannot be found." 756 F.2d at 191 n.10, App. A at 21a. In either case, the effect of the majority's holding will diminish, if not destroy altogether, the validity and use of the summary judgment motion.



## CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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# APPENDICES

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APPENDIX A

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*Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, deceased, Appellant*

*v.*

*Johns-Manville Sales Corporation, et al.*

*No. 83-1694.*

*United States Court of Appeals, District of Columbia Circuit.*

*Argued Feb. 6, 1984.*

*Decided March 8, 1985.*

---

Widow brought wrongful death action, sounding in negligence, breach of warranty, and strict liability, alleging that death of her husband resulted from exposure to products containing asbestos manufactured or distributed by 15 named corporations. Two manufacturer-defendants filed motions challenging district court's in personam jurisdiction, and other 13 defendants filed motions for summary judgment. The United States District Court for the District of Columbia, Charles R. Richey, J., granted various motions as to all defendants, and widow appealed grant of summary judgment as to one corporation. The Court of Appeals, Starr, Circuit Judge, held that: (1) corporation's moving papers were patently defective on their face rendering inappropriate grant of summary judgment, and (2) widow was not required to offer any evidence in response to defendant's unsupported motion for summary judgment.

Reversed and remanded.

Bork, Circuit Judge, filed dissenting opinion.

**1. Federal Civil Procedure ☞2544**

Asbestos manufacturer's moving papers were defective on their face, rendering inappropriate grant of summary

judgment, where manufacturer offered no affidavits, declarations or evidence of any sort whatever in support of its summary judgment motion, but rather, based its motion solely on plaintiff's failure to produce credible evidence to support her claim that her husband's death resulted from exposure to product manufactured by defendant. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

**2. Federal Civil Procedure ☞2544**

Federal Rule of Civil Procedure governing summary judgment unequivocally places burden of coming forward with specific facts upon party opposing motion for summary judgment only when proponent's motion is made and supported as provided in rule. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

**3. Federal Civil Procedure ☞2544**

Party moving for summary judgment carries burden of proving absence of material issue of fact even on issues where other party would have burden of proof at trial. Fed. Rule 56, 28 U.S.C.A.

**4. Federal Civil Procedure ☞2544**

Where asbestos manufacturer proffered nothing, in form of affidavit or otherwise, to support its motion for summary judgment in wrongful death action based upon negligence, breach of warranty, and strict liability, but rather only asserted that plaintiff had not come forward in discovery with evidence to support her allegations that decedent's exposure to manufacturer's product caused his death, plaintiff was not required to offer any evidence in response. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

**5. Federal Civil Procedure ☞2533**

Principle that court may under some circumstances grant summary judgment sua sponte applies to grant of summary judgment when there is no motion for summary judgment before court, not when there was no support for summary judgment motion.



Appeal from the United States District Court for the District of Columbia (Civil Action No. 80-02232).

Peter T. Nicholl, Baltimore, Md., with whom James F. Green and Robert A. Taylor, Washington, D.C., were on brief, for appellant.

H. Emslie Parks, Towson, Md., for appellee, The Celotex Corp.

Charles E. Dorkey, III, New York City, was on brief, for appellee, Turner & Newall Ltd.

Francis J. Ford, Washington, D.C., was on brief, for appellee, Armstrong World Indutries, Inc.

Before WALD, BORK and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge STARR.

Dissenting opinion filed by Circuit Judge BORK.

STARR, Circuit Judge.

Appellant Myrtle Nell Catrett filed this wrongful death action in United States District Court in September 1980. Her complaint, sounding in negligence, breach of warranty, and strict liability, alleged that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by fifteen named corporations. During the proceedings below, two manufacturer-defendants filed motions challenging the District Court's *in personam* jurisdiction; the other thirteen corporate defendants filed motions for summary judgment. The District Court granted the various motions as to all defendants. Mrs. Catrett now appeals only from the District Court's grant of summary judgment to Celotex Corporation.[1]

[1] Mrs. Catrett declined to challenge the dismissal of twelve of the other fourteen parties dismissed as defendants and, prior to oral argument in this court, discontinued her appeal from the dismissal of two parties, Armstrong World Industries and Turner & Newall, Ltd., pursuant to settlement agreements.

After reviewing the record in this case, we are constrained to conclude that the District Court erred in granting summary judgment in favor of Celotex. Accordingly, we reverse and remand for further proceedings.

I

The version of Celotex's moving papers on which summary judgment was granted was filed on December 23, 1981.[2] Celotex argued that summary judgment was proper because Mrs. Catrett had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional limits of [the District] Court."[3] Celotex further contended that "[t]here is no evidence whatscever that the defendant was ever exposed to any [Celotex] product containing asbestos . . . or that any such product was in any way the proximate cause of the decedent's death within the jurisdictional limits of [the District] Court." Statement of Material Facts as to Which There Is No Genuine Issue, *reprinted in* S.R.E. at 3sa-4sa.

[2] Motion of Defendant Celotex Corp. for Summary Judgment (Motion for Summary Judgment), *reprinted in* Appellee's Supplemental Record Excerpts (S.R.E.) at 1sa. Celotex had filed, on September 28, 1981, an earlier motion for summary judgment, which it withdrew on November 9, 1981. *See* Docket Entries at 3-4, *reprinted in* Record Excerpts (R.E.) at 7a-8a.

[3] Motion for Summary Judgment at 1, *reprinted in* S.R.E. at 1sa. While such an argument might be read as a basis for dismissal for lack of personal jurisdiction or for a change of venue, the motion was for summary judgment under Fed. R. Civ. P. 56(b). The District Court's grant of summary judgment must therefore have been based on its conclusion that there was "no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." Transcript of July 21, 1982 Proceedings at 9, *reprinted in* R.E. at 595a (emphasis added). The District Court's ruling was from the bench at the July 21, 1982 proceeding. No written opinion accompanied the ruling.



In opposing this motion, Mrs. Catrett relied primarily on three documents which, she claimed, "demonstrate that there is a genuine material factual dispute"[4] as to whether Mr. Catrett had ever been exposed to Celotex asbestos products.[5] The documents were a copy of the transcript of her husband's July 17, 1979, deposition taken for use in proceedings in his earlier workman's compensation claim and two letters: one from William O'Keefe, of Aetna Life & Casualty, to Mrs. Catrett's attorney and one from the Assistant Secretary of a Chicago enterprise, Anning & Johnson Co., to Aetna, both stating that Mr. Catrett had used a Celotex product during his employment with Anning and Johnson in Chicago in 1970-71. Mrs. Catrett argued unsuccessfully to the District Court that these three documents "evinced the essential link between [Celotex's] product and [Mr. Catrett], and it would be a question for the jury as to whether this was the proximate cause of the decedent's injuries and ultimate death."[6]

Celotex strenuously argues on appeal that plaintiff's evidence is infirm in that the three documents are hearsay and are inadmissible under any exception to the hearsay rule. Such inadmissible evidence, Celotex argues, may not be considered in opposition to a motion for summary judgment.

[1] We need not, however, reach the evidentiary issue,[7] inasmuch as defendant's moving papers were patently defective on their face, rendering inappropriate the grant

[4] Plaintiff's Memorandum of Points and Authorities in Opposition to Motion of Defendant Celotex Corporation for Summary Judgment (Plaintiff's Memorandum), *reprinted in* R.E. at 361a, 362a.

[5] For ease of reference, we use the term "Celotex products" to refer to those products manufactured by Celotex's predecessors in interest and to which Mr. Catrett was allegedly exposed.

[6] Plaintiff's Memorandum, *reprinted in* R.E. at 361a, 362a.

[7] Under our treatment of the case, we need not rule on the admissibility of the documents in question.

of summary judgment on the record as it stood before the District Court. Celotex offered *no* affidavits, declarations or evidence of any sort whatever in support of its summary judgment motion. To the contrary, Celotex's motion was based solely on the plaintiff's purported failure to produce credible evidence to support her claim.[8] While Celotex may have faced difficulty, to be sure, in "proving the negative"[9] that plaintiff's decedent had not been exposed to its products, appellee made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion. As we will now see, that undisputed failure renders its motion fatally defective.

II

[2] Rule 56(e) of the Federal Rules of Civil Procedure, as amended in 1963, could not be clearer that summary judgment under the circumstances before us will not lie. It provides:

> When a motion for summary judgment is made *and supported* as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

[8] Celotex also complained that Mrs. Catrett failed to answer interrogatories and produce documents sought in discovery. Statement of Material Facts as to Which There is No Genuine Issue, *reprinted in* S.R.E. at 3sa-4sa. However, Celotex did not seek sanctions, under Fed. R. Civ. P. 37, for failure to comply with discovery requests but instead sought summary judgment under Fed. R. Civ. P. 56(b). *See* Motion for Summary Judgment, *reprinted in* S.R.E. at 1sa.

[9] We are not faced with, and thus do not address, the situation where a manufacturer, sued by a remote user of its product, seeks to comply with Rule 56 but simply cannot "prove the negative" of non-use or non-exposure without reference to evidence in the hands of the plaintiff. Here, no effort whatever was made by Celotex to comply with the requirements of Rule 56, as we shall see in the text that follows.



Fed. R. Civ. P. 56(e) (emphasis added). This rule unequivocally places a burden of coming forward with specific facts upon the party *opposing* a motion for summary judgment *only when* the proponent's motion is "made *and supported* as provided in th[e] rule." The Advisory Committee Note to Rule 56 explains that "[w]here the *evidentiary matter in support of the motion* does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Advisory Committee Note on 1963 Amendment to Fed. R. Civ. P. 56(e) (emphasis added). As the Supreme Court has clearly stated in this respect, "[b]oth the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970). It is firmly established that the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact.[10]

[10] *See, e.g., Adickes v. S. H. Kress & Co., supra,* 398 U.S. at 160, 90 S. Ct. at 1609; *First National Bank v. Cities Service Co.,* 391 U.S. 253, 289, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968); *Davis v. Chevy Chase Financial Ltd.,* 667 F.2d 160, 172 (D.C. Cir. 1981) ("it is beyond cavil that a party opposing summary judgment is required to proffer rebuttal affidavits or other evidence only if its omission enables the movant to satisfy his burden of showing that no issue of material fact persists"); *Weisberg v. United States Department of Justice,* 627 F.2d 365, 368 (D.C. Cir. 1980) ("It is equally settled in federal procedural law that '[t]he party seeking summary judgment has the burden of showing there is no genuine issue of material fact, even on issues where the other party would have the burden at trial, and even if the opponent presents no conflicting evidentiary matter.'"); *Founding Church of Scientology v. National Security Agency,* 610 F.2d 824, 836 (D.C. Cir. 1979) (same); *National Association of Government Employees v. Campbell,* 593 F.2d

[3] At trial, of course, Mrs. Catrett would have the burden of proving by admissible evidence that her husband's exposure to Celotex's products had proximately caused his death. If Mrs. Catrett failed to satisfy her burden, then her case would be vulnerable to a motion for directed verdict. However, as this court has repeatedly held, the party moving for summary judgment carries the burden of proving the absence of a material issue of fact "even on issues where the other party would have the burden of proof at trial."[11]

[4] In this case Celotex proffered nothing. It advanced only the naked allegation that the *plaintiff* had not come forward in discovery with evidence to support her

1023, 1027 (D.C. Cir. 1978) ("Facts not conclusively demonstrated, but essential to the movant's claim, are not established merely by his opponent's silence; rather, the movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue."); *United States v. General Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975) ("The party seeking summary judgment has the burden of showing there is no genuine issue of material fact . . . even if the opponent presents no conflicting evidentiary matter.") (footnotes omitted); *Bloomgarden v. Coyer*, 479 F.2d 201, 206-07 (D.C.Cir. 1973) ("The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue as to any material fact, and even if his opponent comes forward with nothing, summary judgment must be denied if the facts supporting the motion do not establish the nonexistence of such an issue."); *see also Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1222 (7th Cir. 1984) (defendant asbestos manufacturer did not meet its "burden of showing that no genuine issue of material fact exists in regard to plaintiff's alleged exposure . . . ; therefore plaintiff should not be penalized for failure to attach an affidavit to his response").

[11] *United States v. General Motors Corp., supra*, 518 F.2d at 441; *see also Weisberg v. United States Department of Justice, supra*, 627 F.2d at 368 (quoting *Founding Church of Scientology v. National Security Agency, supra*, 610 F.2d at 836); *Founding Church of Scientology v. National Security Agency, supra*, 610 F.2d at 836 (quoting *United States v. General Motors Corp., supra*, 518 F.2d at 441).



allegations of the decedent's exposure to the defendant's product.[12] Under settled rules, that barebones approach will not do. Mrs. Catrett was simply not required, given this state of the record, to offer any evidence in response.[13]

III

Despite the clear state of the law relevant to the facts of this case, the dissent insists that the grant of summary judgment was proper. That position is based on both a misconception of the factual setting in which summary judgment was granted here and, more generally, on an overly broad reading of a legal proposition.

The dissent insists throughout that the plaintiff lacks any evidence as to causation and that, even accepting the plaintiff's factual allegations, judgment would have to be entered for the movant. Summary judgment was entered, the dissent emphasizes, because the trial judge found no showing of the plaintiff's decedent's exposure to Celotex in

[12] That is not to say that Celotex was required to come forward with some specific form of submission. Indeed, Rule 56 is clear that there is no absolute requirement that the moving party furnish affidavits in support of its motion. But here, Celotex did not simply fail to submit affidavits or declarations in support of its motion; it came forward literally with nothing save for pointing to perceived shortfalls in the plaintiff's case.

It is in no wise unfair to Celotex to require it to support its case under Rule 56, even under the circumstances here. As we noted before, if a party has failed to comply with discovery requests, such as interrogatories and requests for production of documents, the Federal Rules provide an elaborately drawn system of sanctions for failures to comply, including the ultimate sanction of dismissal of one's case. Thus, our ruling in no manner leaves a party such as Celotex remediless in the face of unsuccessful efforts to effect discovery of the opposing side's case.

[13] Since Celotex offered no evidence, we need not and do not speculate as to what showing would have been adequate to meet Celotex's burden.

the District of Columbia or elsewhere.[14] Yet, the plaintiff had offered evidence on that very point. True, the evidence was not in admissible form, but at least some of the evidentiary infirmity was plainly curable. The point is that the plaintiff did have evidence, and if her allegations were accepted by the jury as true, the plaintiff, rather than the defendant, would have been entitled to judgment.

We fully recognize the unique vantage point of the District Courts to evaluate evidence and the reasonable discretion that District Judges rightly enjoy in granting summary judgment. We have no desire to cabin unduly that sound discretion, and our opinion should not have that effect. Here, the bedrock fact is that the summary judgment motion was totally unsupported.[15] The issue on which we rule is therefore purely legal in nature, and our conclusion breaks no new ground whatever. The clear dictate of Rule 56[16] and a long, unbroken line of precedent[17] is that summary judgment is not proper absent a properly supported motion. This case is as simple as that.

The dissent, however, accuses us of failing to follow the law of this circuit, as expressed in *United States v. General Motors, supra,* and hornbook law that summary judgment and directed verdict are functionally equivalent. The charge is groundless. To be sure, *General Motors* states

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[14] *See supra* note 3 and accompanying text. We again note that the discussion at the time the motion was granted actually spoke to venue. It was only the phrase "or elsewhere," appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment ever conceivably proper.

[15] The dissent correctly notes that Rule 56 has no ironclad rule that a motion for summary judgment be supported in any particular manner. The motion does, however, require *some* support, and here support was totally lacking.

[16] *See supra* at 184.

[17] *See supra* note 10.



that a party seeking summary judgment "is entitled to the benefit of any relevant presumptions, and if the established facts and relevant presumptions would have entitled him to a directed verdict at trial, he is entitled to a summary judgment under Rule 56." *General Motors, supra,* 518 F.2d at 441-42. However, in *General Motors,* the movant had established certain facts, namely a significant number of failures in performance not attributable to wear or age of the automobile parts in question, and was given the benefit of the presumption that the failures occurred under specified use or reasonably anticipated abuse. *The equivalency of summary judgment and directed verdict was clearly premised in that case on the existence of this clear and sufficient support for the summary judgment motion.*

This equivalency breaks down only when an unsupported summary judgment motion is made by the party not having the burden of proof at trial. If this case had gone to trial and Mrs. Catrett had offered no admissible evidence in presenting her case, Celotex would plainly have been entitled to a directed verdict even without offering any evidence of its own. In that event, the plaintiff would already have enjoyed the opportunity to present her evidence, and the defendant could appropriately ground a motion simply on her failure to prove her case. Before trial, however, rather than arguing that the plaintiff has not proven her case, the movant for summary judgment argues that the plaintiff cannot prove her case. While Mrs. Catrett *has* not offered admissible evidence, the movant, and the court, are entitled to conclude that she *cannot* offer admissible evidence if but only if the movant has supported its motion in accordance with Rule 56. Again, the pivotal difference between this case and *General Motors* is that in the latter case the motion for summary judgment was supported. To argue that the equivalence between summary judgment and directed verdict in such a situation applies to this case as

well is to ignore the statement in *General Motors* that "[t]he party seeking summary judgment has the burden of showing there is no genuine issue of material fact . . . even if the opponent presents no conflicting evidentiary matter."[18]

[5] The dissent also argues that, since the court may under some circumstances grant summary judgment *sua sponte,* no requirement exists that the lack of a factual dispute be affirmatively demonstrated by the moving party. Support for this proposition is found in 10 A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720 at 28. However, this salutary principle applies to the propriety of a grant of summary judgment when there was no motion for summary judgment before the court, not when there was no support for a summary judgment motion.[19]

[18] *General Motors, supra,* 518 F.2d at 441 (footnotes omitted). The dissent's cite to Wright, Miller & Kane provides no better support for its position. The treatise does note the similarity in the theories underlying summary judgment and directed verdict but also notes the movant's burden to *demonstrate* that his opponent could not support a judgment in his favor at trial. *See* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2727 at 130 (1983).

Professor Moore's treatise also supports the position that the summary judgment directed verdict equivalency breaks down in the case at hand. While agreeing that the two procedures are akin, Moore's observes that their operations differ when the movant would not bear the burden at trial. 6 MOORE'S FEDERAL PRACTICE ¶56.15[3] at 479-80 (1983). Furthermore, Moore's notes that the movant's papers "may in themselves be insufficient to discharge his burden; and in that event the opposing party need proffer no materials in opposition." *Id.* at 488 (footnote omitted). Such would not, of course, be the case with a directed verdict.

[19] Furthermore, the party against whom the judgment is to be entered must have sufficient advance notice. 10A WRIGHT, MILLER & KANE, *supra,* § 2720 at 34. The last minute objection to the evidence proffered by plaintiff, *see* Transcript of July 21, 1982, Proceedings 3-4, *reprinted in* R.E. 587a, 589a-90a, and the apparent reliance by the District Judge on what were actually venue concerns, *see supra* note 3, speak powerfully against that notice here.



Lastly, we respectfully take exception to the dissent's suggestion that we are creating a requirement that a plaintiff, having failed to support his or her case, should be allowed more time to produce admissible evidence. We are doing nothing of the sort. Had Celotex properly supported its summary judgment motion, we would agree that the inadmissibility of Mrs. Catrett's evidence would be fatal to her opposition to the motion. However, we refuse to hold the plaintiff — and the case law is abundantly clear that she should not be so held, *see supra* note 10 — to a higher standard than the movant. Until Celotex properly supported its motion, Mrs. Catrett was not required to offer any evidence at all. We do not hold that she should have more time but simply that her time had not yet come.

IV

The District Court's grant of summary judgment in favor of Celotex Corporation is therefore reversed and the case remanded to the District Court for further proceedings.

*It is so ordered.*

BORK, Circuit Judge, dissenting.

The majority's decision in this case undermines the traditional authority of trial judges to grant summary judgment in meritless cases. Even though the plaintiff has *no* admissible evidence on an essential element of her case, the majority today allows her to survive a motion for summary judgment. This decision will probably lead to an unnecessary trial followed by a directed verdict for defendant Celotex. More generally, the precedent established today will waste trial court time and energy and unnecessarily add to the costs and procedural burdens faced by litigants.

The issue here is whether a trial judge may use summary judgment procedures to require a plaintiff, who

has had ample time for discovery, to show that she has some admissible evidence to support an essential element of her case. The alternatives are that the defendant, which is the moving party, must prove a negative — that the plaintiff can never forward so that the plaintiff has still more time to cure her lack of evidence. The latter alternative apparently means that the plaintiff need never proffer evidence until she faces a motion for a directed verdict at trial. It seems to me better that summary judgment be awarded where, as here, the plaintiff has had two years for discovery and knew that she was expected to show her evidence in response to defendant's claim that she had none. The majority thinks otherwise.

In my view, the majority opinion rests on a flawed premise: that a district judge can never grant summary judgment, even in an obviously meritless case, unless a party first makes a motion pursuant to Rule 56 and supports that motion with admissible evidence. The result in this case is that the plaintiff is granted an unsought extension of time to cure the defects in her proof. The premise being wrong, the result is gratuitous.

I.

The majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute. The cases the majority cites hold only that a moving party has the burden of showing the absence of a material, factual dispute, even on issues where his opponent would have the burden of proof at trial. Maj. op. at 5 nn. 10, 11. These cases do not consider the central question here: whether that showing must invariably be made with evidence.

It is important to keep in mind the distinction between a plaintiff's burden of proof on the merits and a defendant's burden of proof on summary judgment. The standards of



proof by which each burden is satisfied are not necessarily the same. A plaintiff must prove his case by an affirmative, preponderance of the evidence. However, a defendant seeking summary judgment need only convince the trial judge that a reasonable jury could not find for the plaintiff, even if all disputed issues of fact and inferences were resolved in the plaintiff's favor. There is no requirement that the trial judge must always become convinced of this by a positive evidentiary showing. Several principles of summary judgment law demonstrate that while a positive evidentiary showing will usually be necessary, it is not always required.

First, it is hornbook law and the law of this circuit that a trial judge should grant summary judgment if the plaintiff has so little evidence on an essential element of his claim that it is clear that a directed verdict would have to be granted at trial. 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2713.1, at 616 (1983); *United States v. General Motors Corp.*, 518 F.2d 420, 441-42 (D.C. Cir. 1975); *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952) (L. Hand, J.). As Judge Leventhal has said, a party seeking summary judgment "is entitled to the benefit of any relevant presumptions, and if the established facts and relevant presumptions would have entitled him to a directed verdict at trial, he is entitled to a summary judgment under Rule 56." *General Motors*, 518 F.2d at 441-42. There is no point in sending a case to trial only to have the judge direct a verdict. In this case, a directed verdict would clearly be required since the plaintiff lacks any admissible evidence of causation, an essential element of her case.

In this respect, a motion for summary judgment is like a motion for a directed verdict. In neither is an evidentiary showing invariably required.[1] In both the moving party's

[1] A directed verdict may be granted at the close of plaintiff's case even before defendant has introduced any evidence at all.

burden is satisfied if he persuades the trial judge that his opponent must lose as a matter of law even when all disputed facts and inferences are resolved in his opponent's favor.[2]

The analogy between summary judgment and directed verdicts has been emphasized by Wright & Miller.

> [I]t [is] clear that the movant may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent. If no evidence could be mustered to sustain the non-moving party's position, a trial would be useless and the movant therefore is entitled to judgment as a matter of law. In this sense the theory underlying summary judgment is similar to that of the directed verdict motion.

10A. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2727, at 130 (1983). Pursuant to these principles and to our decision in *General Motors,* 518 F.2d at 441-42, defendant Celotex is clearly entitled to summary judgment. Plaintiff's total lack of affirmative, admissible evidence of causation would result in a directed verdict at trial and should therefore warrant a grant of summary judgment now. The majority's refusal to uphold

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This is appropriate when the plaintiff's case and the evidence supporting it are legally insufficient to support a favorable verdict. We have exactly this situation in this case at the summary judgment stage.

[2] This is not to suggest that the standards for granting summary judgments and directed verdicts are absolutely identical. Where competing inferences from the alleged facts are fairly possible, judges should be more charitable to non-moving parties on summary judgment especially until demeanor evidence can come out. *See, e.g., Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 160, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970) (Harlan, J.). However, where competing inferences are not possible and especially where there is a complete absence of proof, the standards governing summary judgment and directed verdicts largely coincide.



that grant represents a clear failure to follow *General Motors*[3] and overlooks this functional identity between summary judgment and directed verdicts.[4]

A second principle of law also shows that the majority has erred. Under some circumstances, trial judges may grant summary judgment *sua sponte* so long as the losing party was on notice that he had to come forward with all his evidence. 10A. C. Wright, A. Miller & M. Kane, *supra,* § 2720, at 28. This rule clearly means that summary judgment does not require affirmative evidentiary proof of the absence of a factual dispute. Rather the trial judge need only notice this absence and demand that it be corrected. If it is not corrected after notice,[5] it becomes the trial judge's duty to grant summary judgment to conserve scarce judicial resources and avoid a useless trial. If the district court, on its own motion, may grant summary

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[3] It is true that in *General Motors* the party seeking summary judgment was only able to benefit from the relevant presumptions after it had established certain facts. In this case, however, it is not necessary for the defendant to establish any facts to benefit from the presumption that the plaintiff must prove causation. The need to establish facts in support of a summary judgment motion will depend on the nature of the presumptions at issue.

[4] The majority suggests that a passage in Moore's supports its position that the summary judgment directed verdict equivalency breaks down in the case at hand. 6 J. Moore, *Moore's Federal Practice* ¶56.15[3] (2d ed. 1972) (footnote omitted). I think this passage irrelevant to the present case because it clearly contemplates a situation where the plaintiff has at least a shred of evidence with which to go to trial. In that circumstance a moving defendant would have to produce contrary evidence to prove the absence of a triable, factual dispute. Here, however, the plaintiff has made no factual showing whatsoever. Accordingly, but for the unsought and indefinite extension of time the majority improperly grants the plaintiff, there would be no question but that the plaintiff could not possibly prevail.

[5] *See infra* Part II for a discussion of the adequacy of the notice given in this case.

judgment whenever it concludes that required evidence cannot be produced, it necessarily follows that a defendant may obtain summary judgment when it brings that situation to the court's attention.[6]

A third relevant legal principle is the substantial pretrial discretion trial judges enjoy to manage their caseloads. It is hard to see how that discretion is abused if a judge, at the defendant's request, asks a plaintiff to show that he has minimal evidence to support his case before he can go forward to trial. Indeed, district judges have broad pretrial authority to force the parties to narrow issues in order to reduce trial time by isolating the particular factual disputes that are to be tried. Fed. R. Civ. P. 16. This authority would be mocked if plaintiffs could not be obligated before trial to reveal that they had at least some evidence supporting the essential elements of their lawsuit.[7]

Finally, Rule 56 itself imposes no obligation on parties seeking summary judgment always to introduce positive evidence proving the absence of a factual dispute.

[6] The majority agrees that a trial judge is empowered to grant summary judgment *sua sponte* when he concludes that a plaintiff has not produced any admissible evidence on an essential element of her claim. In this case, however, the majority finds the trial judge stripped of his power to act solely because the defendant Celotex filed an unsupported motion. I do not understand why this action by a party to the law suit diminishes the authority the trial judge would otherwise possess. I also do not understand why the majority continues to focus on Celotex's motion papers and does not focus instead on the absence here of a triable, factual dispute.

[7] It should be noted that Fed. R. Civ. P. 37 does make available various sanctions where a party improperly resists discovery. However, the availability of those sanctions does not also preclude a party from seeking summary judgment where the plaintiff has failed to fulfill his obligation to make out a prima facie case. The problem here is not resistance to discovery but inability to provide evidence.



Although the framers of the rule probably thought such evidence would be necessary in most cases, *see* Advisory Committee Note to Rule 56, they imposed no ironclad requirement. Indeed, Rule 56 specifically allows for summary judgment on motion without a supporting affidavit. Fed. R. Civ. P. 56(b). This is appropriate in cases like the present one where even accepting the non-moving parties' factual allegations one must still enter judgment for the movant. *See, e.g., Chambers v. United States,* 357 F.2d 224, 227 (8th Cir. 1966); *Hubicki v. ACF Industries, Inc.,* 484 F.2d 519, 522 (3d Cir. 1973); *Ramsey v. United States,* 329 F.2d 432 (9th Cir. 1964); *Reynolds v. Needle,* 132 F.2d 161, 162 (D.C. Cir. 1942); *Seago v. North Carolina Theatres, Inc.,* 42 F.R.D. 627 (4th Cir.), *aff'd,* 388 F.2d 987 (1966). Here as in *Chambers* "no factual dispute exists and the complaint [absent evidence of causation] does not state a cause of action." 357 F.2d at 227.

Since this case lacks a *triable,* factual dispute, even if Celotex were to stipulate to the truthfulness of all of Mrs. Catrett's admissible evidence, Celotex would still prevail as a matter of law. The majority believes there is a triable, factual dispute in this case solely because Mrs. Catrett alleged causation in her complaint. Bare allegations in a complaint are not admissible at trial, however, and would not support a jury verdict for Mrs. Catrett.[8]

Rather than properly focussing its inquiry on whether a triable, factual dispute exists in this case, the majority has become entangled in the interplay between the defendant's burden of proof on the summary judgment motion

[8] It is, of course, conceivable that on remand Mrs. Catrett will eventually find admissible evidence of causation and possibly even prevail at trial. This would not in any way change my conclusion that we should affirm the grant of summary judgment before us now. It is settled law that courts should not allow a party to get to trial merely in the hope that he will obtain evidence at that time. 10A C. WRIGHT, *supra,* § 2727, at 163.

and the plaintiff's burden of persuasion in this lawsuit, which she retains at all times. The majority has required the defendant to prove in effect the negative of the plaintiff's case, even though the plaintiff has no evidence on an essential element of her claim. This temporarily switches the plaintiff's burden of persuasion in the lawsuit to the defendant which now must prove that it could not conceivably have caused the plaintiff's injury. The majority should have required the defendant only to persuade the trial judge that there is no triable, factual dispute on causation.[9]

I agree with the majority that in most cases defendants will only be able to establish the absence of a factual dispute by producing positive evidence that undermines the plaintiff's factual showing. So long as the plaintiff has even one iota of weak inferential evidence, defendants will have the burden of affirmatively attacking that evidence to prove that there is no factual dispute suitable for trial. *Adickes v. S. H. Kress & Co.*, 398 U.S. at 160, 90 S. Ct. at 1609. Here, however, the plaintiff has made no factual showing whatsoever. Accordingly, there can be no doubt as to the absence of a triable, factual dispute in this case.

II.

The majority also objects to the grant of summary judgment in this case on the ground that plaintiff Catrett should be given an additional opportunity to produce admissible evidence on causation. I disagree. This case is

[9] The majority cites Fed. R. Civ. P. 56(e) as support for its view. This provision does indicate that when a motion for summary judgment is made and supported by affidavits it must be answered with rebutting affidavits. Clearly, Mrs. Catrett need not produce rebutting affidavits since Celotex has not produced any affidavits in support of its motion. Nonetheless, Mrs. Catrett is still obligated to produce some admissible evidence supporting the essential elements of her case. I do not see why she should be able to get to trial just because she was not obligated to produce rebutting evidence under Rule 56(e).



just like one in which, after discovery, the judge holds a pre-trial conference, asks the plaintiff how he intends to prove each element of his case, and learns that the plaintiff has no admissible evidence of an indispensable element of that case. That case would be ripe for disposition by summary judgment. Here, Mrs. Catrett has had almost two years to prepare her case for trial. The motion for summary judgment put her on notice that Celotex claimed she had no evidence of causation. Mrs. Catrett was represented by counsel who were certainly aware that the district judge could consider only admissible evidence in determining the existence of a triable, factual dispute.[10] 6 J. Moore, *Moore's Federal Practice* ¶ 56-11[1-8] (2d ed. 1972), *Government of Republic of China v. Compass Communications Corp.*, 473 F. Supp. 1306 (D.D.C. 1979). Any trained attorney should have known that what was offered was inadmissible. Counsel not only failed to produce any admissible evidence of causation but failed at the summary judgment hearing to seek additional time to produce such evidence. Under these circumstances, the district judge clearly acted within his discretion in granting summary judgment without giving Mrs. Catrett an additional, *unrequested* opportunity to produce admissible evidence essential to her case. As appellate judges, we should leave the district court substantial discretion to manage the litigation before it.

[10] In a departure from the established rules, the majority suggests that the district judge could consider inadmissible evidence of causation because the admissibility problems with the evidence might eventually be cured. This holding destroys any incentive that parties now face to put evidence into admissible form prior to trial, and diminishes the utility of pre-trial efforts to narrow and isolate the factual issues that are to be tried. The majority's holding will inevitably lead to pointless trials where anticipated factual disputes fail to materialize because *admissible* evidence cannot be found. The majority's innovation on this point will substantially undermine the utility of summary judgment procedures while yielding no concomitant benefits.

That discretion includes the discretion to determine when a summary judgment is ripe.

It would have been better if the majority reached the result it does by holding that plaintiff should have been given a new deadline to produce admissible evidence of causation. That would, for the reasons just given, be wrong, but at least it would not damage the utility of Rule 56. I understand the judicial impulse to save a plaintiff's case from what may have been careless preparation, but the deformation of summary judgment procedures is too high a price to pay for the gratification of that impulse.



## APPENDIX B

*In The United States District Court*
*For the District of Columbia*

*Civil Action 80-2232*

*Myrtle Nell Catrett,*
*Plaintiff,*

*v.*

*Johns-Manville Sales Corporation, et al.,*
*Defendants.*

Wednesday, July 21, 1982
Washington, D.C.

The above-entitled matter came on for a hearing before the Honorable CHARLES R. RICHEY, United States District Judge, Courtroom 11, commencing at approximately 1:00 p.m.

Appearances: Peter Nicholl, Esq., on behalf of the Plaintiff.

Charles Dorkey, Esq., Francis Ford, Esq., and William McMurtrie, Esq., on behalf of the Defendants.

(2) PROCEEDINGS

DEPUTY CLERK: Civil Action 80-2232, Myrtle Catrett versus Johns-Manville Sales Corporation, et al. For the plaintiff, Peter Nicholl; for the defendant, Charles Dorkey, Francis Ford, and William McMurtrie.

THE COURT: Who represents Celotex?

MR. McMURTRIE: Mr. McMurtrie, Your Honor.

THE COURT: Come forward. Do you want to argue your motion? That is what we are here for.

MR. McMURTRIE: Your Honor, I have two motions pending, one the motion for summary judgment and in the alternative, a motion to transfer for lack of venue. In the primary motion, Your Honor, the motion for summary judgment, I will be very brief because the Court has all the information I believe that it needs.

Our position is strikingly similar, if not exactly the same, as Johns-Manville in that although we have a registered agent in this area there has been no product identification of any Celotex products, both carries Philip Carey products, Carey Canada products, what have you, that have been used in the District of Columbia to which the decedent was exposed.

By the plaintiff's own documents, its own response to the Celotex inquiry, as well as the master set of interrogatories presented to this court, the only exposure (3) to any Celotex product by the decedent was in Chicago and by documents attached to their answers to interrogatories, there is a letter from a T. R. Huff, who is the assistant secretary for a corporation known as Annand & Johnson, saying that he did work for their company during that period December 22, 1970 to December 22, 1971 and at that time his duties were to supervise and train crews in the application of a fire-bar fireproofing.

Now, in 1980, or 1981, the interrogatories were propounded, the master set as well as my supplemental set. The Court gave them leave to file their answers to my supplemental set at a later date, February 9th, I believe, 1982. Those answers to date still would not satisfy that court as to product identification of any Celotex product or co-workers who would then identify on behalf of the



decedent, exposure to asbestos products manufactured by Celotex Corporation in this area or in any other area, including Chicago.

Your Honor, there is only a letter from the assistant secretary and that is not—

THE COURT: Doesn't plaintiff say that the decedent was exposed to your company's products in the area of Chicago.

MR. McMURTRIE: He suggested that there was exposure in Chicago, Your Honor. We do not admit that and (4) there is no affidavit to support that. We only have a self serving answer to interrogatories.

THE COURT: That says?

MR. McMURTRIE: It simply says — well, all it is is a letter from a Mr. T. R. Huff.

Now—

THE COURT: What does it say?

MR. McMURTRIE: It simply says that his duties were to supervise and train crews in the application of a fire-bar fireproofing. He worked only in new construction and traveled from district to district. That was in Chicago. We also have, and they rely on this, the deposition of the decedent that was taken of him prior to his death for the compensation claim, which would not be admissible in this case either.

THE COURT: Why?

MR. McMURTRIE: Celotex was not there, had no opportunity to cross-examine this defendant or this decedent. But he does say, for the limited purposes of use in this motion, that he was not exposed to any product in the District of Columbia manufactured by Celotex. He only worked in the Chicago area and its environs or in Los Angeles or New York, I believe.

THE COURT: What about their argument that the continued tortious effect of the exposure in Illinois (5) continued into the District of Columbia.

MR. McMURTRIE: Your Honor, I believe we would be governed by your ruling in 1976 in the Leaks versus Ex-lax case at 430 Fed. Supp. 413 that the tortious injury was in Chicago if he were exposed to a Celotex product or the asbestos fibers of a Celotex product in that area, but that any loss after that, as far as Celotex is concerned, forgetting Johns-Manville or any of the other 15 defendants who started in this case, was a pecuniary loss in the District of Columbia; but no further exposure in the District of Columbia and there is no affidavit supporting a further exposure by a Celotex product.

I think what we have here, Your Honor, is a time when these asbestos cases were first blooming in the District of Columbia, having happened in Norfolk and Philadelphia long before this, but there was a race to the courthouse by different law firms to gain control of a union. This case was inadequately prepared at the time to sufficiently identify the manufacturers of certain asbestos products.

We know, for example, that the decedent was exposed for a considerable period during World War II to asbestos products.

This court has already ruled in the Johns-Manville motion for summary judgment that although there is a (6) suggestion of exposure in 1952 and 1953 to J. M. Plaster products, there is no affidavit to support that exposure by way of co-workers. And that is exactly the same situation as Celotex is in.

THE COURT: All right. Let me hear from the other side.

MR. NICHOLL: Thank you, Your Honor.



Your Honor, Peter Nicholl for the plaintiff, sir. Regarding our substantiation that there was an exposure to a Celotex product we do have Mr. Huff's letter which states that he was exposed to fire-bar during the period of time for the year ending, I believe, December 1971, 1971 being the year in question.

By virtue of attachments to Celotex's motion to change venue, those attachments being the purchasing records from the Carey Canadian Mine Company to Annard & Johnson, the employer in Chicago, we do have indications that this fire-bar product was indeed an asbestos product and that that ties in the fact that this fire-bar fireproofing was an asbestos product.

THE COURT: Let me see the Huff letter.

Where does it say it was done in the District of Columbia?

MR. NICHOLL: I did not say in the District of Columbia.

(7) THE COURT: It had no contact with the District of Columbia.

MR. NICHOLL: I readily admit that there was no exposure to the Celotex products in the District of Columbia but that does not go to the question of the merits of the case for purposes of summary judgment. It may go to the question of changing venue, which is the other motion that Mr. McMurtie filed.

THE COURT: Was your client exposed to it in the District of Columbia?

MR. NICHOLL: No, sir, he was not. He was exposed to it in Chicago and I believe three or four other areas out west.

THE COURT: How can I entertain the action here and avoid granting their motion for summary judgment?

MR. NICHOLL: Summary judgment would go to the merits of the case by saying that we cannot prove exposure to their product. We can show exposure to their product.

THE COURT: What have you shown in opposition to their statement of material facts which are not in dispute?

MR. NICHOLL: We have opposed that, Your Honor, with our own in response to their motion.

THE COURT: You have what?

MR. NICHOLL: We have stated our own in response to their motion.

(8) THE COURT: You don't state it was exposed here.

MR. NICHOLL: No, sir, we admit he was not exposed to their product in Washington. But again that would go to a change of venue as opposed to summary judgment. In that regard—

THE COURT: Would they be obliged to defend an action in this district?

MR. NICHOLL: They do business in the district. They really admit that. Mrs. Catrett is still a resident of the district. Mr. Catrett was a resident of the district. Our witnesses are nearby in Virginia. It would be, I think, dilatory to transfer it to Chicago, I submit, but on the other hand, it again does not go to the merits of the case.

THE COURT: It can't be tried here, you know that.

MR. NICHOLL: I don't know that. I think it would do an injustice to Mrs. Catrett to exchange or to transfer the case to Chicago when it has been in front of Your Honor for two years.

THE COURT: When it has been in front of me for two years?



MR. NICHOLL: In front of the court here for two years.

THE COURT: Not in front of this court.

MR. NICHOLL: That is right. It was previously in (9) front of another judge.

THE COURT: What if we transfer it out to Chicago, you can't oppose that really, can you?

MR. NICHOLL: Your Honor, I can only oppose it on grounds that it would delay the matter, that it has already been approximately two years, that it would cause an inordinate cost to Mrs. Catrett being that she is a resident of the district, and we feel that it is her right to bring her action here. She can proof exposure but not in the district, and I think that should be certainly sufficient for the Court here to maintain jurisdiction over the action. If there is any hardship — Mr. McMurtrie doesn't really speak of any hardship that is going to accrue to him by keeping the case here.

THE COURT: He doesn't have to. All right. Anything else you want to say?

MR. NICHOLL: No, sir, Your Honor.

THE COURT: The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.

Let's have the Turner & Newall motion to dismiss for lack of jurisdiction, insufficiency of process or service of process.

(10) MR. DORKEY: Yes, Your Honor. My names is Charles Dorkey. I represent Turner & Newall on this motion.

THE COURT: Yes.

MR. DORKEY: I don't know whether you want me to recite the procedural history of the case or go to the facts.

THE COURT: Go to the facts.

MR. DORKEY: It seems to—

THE COURT: Why doesn't this court have jurisdiction?

MR. DORKEY: Because plaintiff has not made out the statutory prerequisites under either 13-423A3 or A4. And moreover, there is insufficient contacts for this court to constitutionally exercise its jurisdiction. Under A3 which requires an act in the jurisdiction and injury in the jurisdiction, plaintiff has shown no act by Turner & Newall in the jurisdiction. The cases supplied in my reply brief indicate that all of those cases involve automobile accidents in the district or an employee going into the district and hurting somebody.

In this case what the most we have is we have a product allegedly manufactured in England, shipped to a company in Pennsylvania, which company in Pennsylvania shipped it to a Virginia company, which Virginia company by its own unilaterally act used in the District of Columbia.

(11) Under A4 of the personal jurisdiction statute, that would clearly be, as alleged, an act without the jurisdiction and injury within. However, A4 requires substantial affiliating circumstances.

THE COURT: Are you familiar with the case of Collins versus New York Central? You didn't cite it.

MR. DORKEY: No, Your Honor.

THE COURT: You should have.



Go ahead. Your company isn't qualified to do business here, is it?

MR. DORKEY: No.

THE COURT: It does not maintain an office or telephone.

MR. DORKEY: And has not done so for ten years.

THE COURT: It has no contacts in the district.

MR. DORKEY: No, and we have put in four affidavits on this question. We have searched our records back ten years.

THE COURT: What about your wholly-owned subsidiary.

MR. DORKEY: Keasby & Mattison Company? First of all, for a wholly-owned subsidiary, plaintiff has made the insufficient allegations or indeed a showing to impute the acts of the subsidiary to Turner & Newall but even assuming that plaintiff has done that, there are two answers I have (12) to—

THE COURT: He never worked for Craft and Murphy or Keasby and Mattison.

MR. DORKEY: Plaintiff worked for Craft Murphy, that is clear. Plaintiff did not work for Keasby and Mattison. However, Keasby and Mattison — there is no proof that Keasby and Mattison had the affiliating circumstances with the District of Columbia. In order for the act from without the jurisdiction to cause injury within there has to be not only that act and injury within but there has to be affiliating circumstances of Keasby and Mattison. There is no showing that Keasby and Mattison had any of these affiliating circumstances.

THE COURT: Anything else you want to tell me?

MR. DORKEY: The only other thing is that section A4 speaks of present day affiliating circumstances Keasby was involved in 1962 and therefore it could not have done business anywhere for 20 years.

THE COURT: All right. Counsel.

MR. NICHOLL: Thank you, Your Honor. Your Honor, Mr. Catrett, by affidavit to our opposition to their motion, was exposed to a product known as limpet spray which Mr. Boil, the representative of Kraft Murphy states in an affidavit they purchased from Keasby Mattison and Armstrong Contracting and Supply, which was in fact purchased further (13) from Turner & Newall.

We further have an affidavit from Mr. Timmis, a co-worker, who states that he was exposed to limpet spray in 1962—

THE COURT: You are going awfully fast and some of the words are running right together, if I don't understand them, I don't think anyone else does either.

MR. NICHOLL: I will slow down.

THE COURT: You better start over again.

MR. NICHOLL: Okay. We have an affidavit in opposition to the motion to dismiss by Mr. Dorkey that an affidavit by Richard Boil of Craft Murphy, an employer of Mr. Catrett, that Mr. Catrett was indeed exposed to a product known as limpet spray.

THE COURT: Spell it.

MR. NICHOLL: L-I-M-P-E-T. We further have an affidavit from a Mr. Timmis, a co-worker of Mr. Catrett's, while he was employed at Craft Murphy.

THE COURT: Where?



MR. NICHOLL: At Craft Murphy in D.C., that he was exposed to limpet spray in 1962 while working on the U.S. capitol, and those affidavits are contained in our opposition to the motion to dismiss, Your Honor. We maintain that that of course is sufficient evidence.

THE COURT: That was in 1962, wasn't it?

(14) MR. NICHOLL: That is correct, sir.

THE COURT: How do you get around the statute of limitations, assuming there is sufficient jurisdiction personal jurisdiction here?

MR. NICHOLL: The discovery rule, Mr. Catrett wasn't aware of the disease process until the late seventies, that in fact his exposure at that time caused his mesothelioma.

THE COURT: What year?

MR. NICHOLL: What year did he contract the disease, sir?

THE COURT: Yes.

MR. NICHOLL: 1978.

THE COURT: When did he file suit?

MR. NICHOLL: In 1980, within three years of the date of discovery.

THE COURT: All right. Anything else you want to tell me?

MR. NICHOLL: Additionally, I think that further in that attachment to our opposition to their motion, I have a brochure from Turner Newall which states in the brochure that Keasby Mattison was one of their subsidiaries, and in that brochure it states something to the effect and I can cite the page, Your Honor, if you want me to, page 32 of that brochure — and it states that Keasby Mattison (15)

being in the United States was basically at the doorsteps of the entire country of the United States for purposes of distribution of their product.

We maintain that that knowledge on the part of Turner & Newall that distribution of its limpet spray to a subsidiary, Keasby Mattison, put them on knowledge within the foreseeability, as stated in the Volkswagen versus Woodson case, that their product could very well end up in the District of Columbia, like it did, and that Mr. Catrett could end up being exposed to their product, like he did, and that Mr. Catrett could end up developing a cancer, like he did, some 20 years later.

THE COURT: All right. Mr. Dorkey, do you want to respond?

MR. DORKEY: Just a few points, Your Honor.

First, in 1962, Craft Murphy was located in Virginia not in the District of Columbia. Second, for Keasby and Mattison, the brochure, the brochure on page three says, "Under the Turner & Newall's method of organization, under this method of working, the separate units in the organization, subsidiary companies, operate with a large measure of freedom and flexibility and local tradition and good will are fostered." This brochure is completely consistent with the several affidavits of the group of Turner Newall that Keasby was a wholly (16) owned but independently operated subsidiary of Turner Newall.

THE COURT: It did business in the District of Columbia, didn't it?

MR. DORKEY: Because it happened prior to 1962, I am not aware that it did business other than this single use of the product that Mr. Catrett's co-worker testified to, which was brought unilaterally by Craft Murphy to the District of Columbia.



It is not clear to me, and the record doesn't show and I think that this is one of the great problems with these cases, that you are dealing with events 20, 30, 40 and 50 years ago and there is no way that people can know these things.

THE COURT: Anything else?

MR. DORKEY: No, Your Honor.

MR. NICHOLL: Your Honor, could I add something very quickly, sir, and that is that in 1955 according to Mr. Boil's affidavit, Craft Murphy was located at 2302 Wisconsin Avenue, Washington, D.C.

THE COURT: The motion is overruled.

Who wants to speak for Armstrong?

MR. DORKEY: Your Honor, did you deny our motion to dismiss for lack of personal jurisdiction?

THE COURT: That is correct. I overruled it.

(17) MR. FORD: Good afternoon, Your Honor.

THE COURT: Mr. Ford, nice to see you, sir.

MR. FORD: In this case, we have filed a motion for summary judgment on behalf of the defendant named herein as Armstrong Cork.

THE COURT: It is Armstrong World Industries.

MR. FORD: Yes, Your Honor, we have answered the suit in the name of Armstrong World Industries, which is the successor corporation of Armstrong Cork. There is no problem on that score.

THE COURT: All right.

MR. FORD: In the complaint, the plaintiff alleges that Armstrong World Industries, if you will, was negligent and/or that it breached warranties in that it designed, manufactured, produced, tested and labeled certain asbestos products which the decedent was exposed to.

We filed, on behalf of ourselves and all defendants, a general set of interrogatories to the plaintiff, and the answers to those interrogatories failed to reveal any exposure by the decedent to any asbestos containing product manufactured or produced by Armstrong World Industries. Subsequently, we filed a motion for summary judgment on the grounds that there was no such exposure.

The plaintiff, in her opposition to that motion, (18) comes back and says, in effect, "We agree that Armstrong World Industries did not manufacture or produce any such asbestos containing product, but Armstrong Contracting and Supply was a licensee of the product known as limpet, which in turn was manufactured by others, and there was such an exposure to Mr. Catrett to limpet sometime back in the mid sixties."

The opposition to the motion for summary judgment then is that in lieu of Armstrong World Industries, the Court should look to Armstrong Contracting and Supply, which was a subsidiary corporation.

Among the papers filed by the plaintiff in opposition to the motion for summary judgment, is a financial statement put out by Armstrong World Industries, and the plaintiff highlighted the following in its opposition: In 1958 a subsidiary, Armstrong Contracting and Supply Corporation, was formed to handle contract insulation business and allied sales.

The facts before the Court are that in 1958 actually in 1959 this corporation was formed as a wholly-owned subsidiary. It has continued or did continue to function as



such until approximately 1969, when all of the stock was sold to another corporation and it continues to operate to this day. It is a viable, ongoing concern and has been a viable going concern since 1959. We see no reason why the (19) corporate identity of AC&S should be ignored in order to allow the plaintiff to sue.

THE COURT: They could get leave to amend, could they not?

MR. FORD: Absolutely.

THE COURT: Come up here. Stand beside Mr. Ford. I don't see how I can avoid granting Armstrong World Industries' motion for summary judgment, but you probably would have a right to substitute the other successor corporation.

MR. NICHOLL: Would Your Honor be stating that if we filed the motion to amend bringing in AC&S that Your Honor would have no problem with that?

THE COURT: I don't see any off the top of my head.

MR. FORD: I can not speak for AC&S. Patently there is a limitations problem.

MR. NICHOLL: That is patently obvious, Your Honor. Which is one of my major concerns.

THE COURT: You sued the wrong person.

MR. DORKEY: May I be here heard because we put in papers the opposition to Armstrong World Industries' motion.

THE COURT: Are you involved in that?

MR. DORKEY: I object to the fact of dismissing out Armstrong because I think we put in sufficient factual evidence to put in issue the question of the

relationship (20) between Armstrong Cork and Armstrong Contracting and Supply.

Even if we have not put in sufficient evidence from discovery in other cases, we have not had an opportunity, under Rule 56F of the Federal Rules of Civil Procedure, because subject to the Court's jurisdiction we were not able to take discovery on this very issue of the relationship between Armstrong Cork, as it was then known, and Armstrong World, as it is now known, and Armstrong Contracting and Supply.

THE COURT: Why weren't you?

MR. NICHOLL: They just became a party today.

MR. DORKEY: By your ruling today, and I would like to reargue and try to convince Your Honor that we really are not subject to jurisdiction under either the D.C. code or the United States constitution, but until today we were not a party to the action.

THE COURT: You can take discovery even before you—

MR. DORKEY: But, Your Honor, it is inconsistent with our position of jurisdiction, and to take discovery on the merits, Your Honor, is oftentimes considered to be a waiver of a party's jurisdictional objections and we face that other problems in other jurisdictions.

THE COURT: You don't have that problem in the federal courts anymore. That used to be the rule but not today.

(21) MR. DORKEY: I am sure Your Honor is more understanding than other judges, but we have had this problem in other courts.

THE COURT: That is an old rule older than Mr. Ford even.



MR. DORKEY: But we have not had an opportunity to take discovery on that issue in this case and under Rule 56F I think we have made out a case why in addition to the affidavits and the deposition evidence we have put in this case, which clearly raises a factual issue, Your Honor, going to the control of Armstrong Cork over AC&S—

THE COURT: Why should Mr. Ford be penalized because of you?

MR. DORKEY: He is not being penalized because of me. Armstrong Contracting and Supply, when it was a subsidiary of Armstrong Cork, had no legal department, had no accounting department.

THE COURT: We are talking about Armstrong World Industries' motion for summary judgment.

MR. DORKEY: That is right, on the grounds that it is not responsible for Armstrong Contracting and Supply, a subsidiary.

THE COURT: That is right.

MR. DORKEY: There is law in this district and in other jurisdictions that sometimes if a parent exercises (22) overwhelming control, and given other circumstances, it is responsible for the acts or omissions of its subsidiaries.

THE COURT: Do I understand the plaintiff to be contending that the decedent was exposed to the products of a subsidiary of Armstrong World Industries, namely, Armstrong Contracting and Supply Company, Inc.?

MR. NICHOLL: That is correct, Your Honor.

MR. FORD: It was not a product. That is the irony of Mr. Dorkey's position.

THE COURT: They are distributors.

MR. FORD: Of Mr. Dorkey product, and in effect he is arguing to hold AC&S in, or Armstrong in, so he can seek contribution or indemnification against them for his product. And my position is very clear, that if he wants to go after someone he ought to go after his distributor, which was AS&C, and who he licensed. Why come after Armstrong World Industries when there is a viable corporation and his own papers show that they have liability insurance?

THE COURT: Turner Newall also opposes, don't they?

MR. FORD: Yes, sir.

MR. DORKEY: One reason is that — one reason we go after both Armstrong World and Armstrong Contracting Supply is because at the time, the relevant time, they were essentially one entity, Your Honor. It was a division (23) prior to 1959. They made it into a subsidiary. Nothing else changed. It kept the big "A", Armstrong logo during that time period and throughout the time period it operated under the egis, it was all part of one enterprise, same logo, same advertising, everything.

THE COURT: Do you want to say anything else?

MR. DORKEY: I would like to say some things on your denial of the motion for personal jurisdiction.

THE COURT: I am not going to let you reargue that. Do you want to say anything else?

MR. NICHOLL: I would simply state for the record that we adopt the opposition of Turner & Newall to the motion for summary judgment by Armstrong World.

THE COURT: What would be the effect if I grant Mr. Ford's motion? It seems to me the Court is almost compelled to.



MR. NICHOLL: I would think, Your Honor, if I could add something, in January of 1982 we did propound a second set of interrogatories, which would perhaps go to the issue of control of AC&S, or Armstrong Contracting and Supply and Armstrong World.

Mr. Ford did answer those interrogatories, I believe, a couple of weeks ago, but unfortunately when we reached the questions of Armstrong Contracting and Supply and their relationship with Armstrong World they were (24) silent. I would at least request, Your Honor, that we have—

THE COURT: You have had more than ample time. How long has your motion been pending Mr. Ford?

MR. FORD: A number of months.

THE COURT: The motion will be granted, the motion for summary judgment, by Armstrong World Industries.

MR. DORKEY: As long as I am stuck in the case now that you have let everybody else out, even though there are many other people's products who this plaintiff was exposed to—

THE COURT: What else do you have?

MR. DORKEY: I would like to know whether you have any written rulings on these?

THE COURT: No, I do not, counsel. Who has this Huff letter? Did you hand that up to me?

MR. McMURTRIE: I did, Your Honor.

THE COURT: You can present an order, Mr. Ford, or have I already gotten it?

MR. McMURTRIE: I think you have an order from Celotex.

THE COURT: You can work with Mr. Ford.

MR. DORKEY: Excuse me, Your Honor. So what you will do is just simply sign—

THE COURT: I am signing an order based on the (25) authorities in the opposition given.

MR. DORKEY: Could you explain the reasoning why you held us in on jurisdiction?

THE COURT: Sir, no judge has to give you the reason.

MR. DORKEY: I know, I was just asking for some guidance, that is all, Your Honor.

THE COURT: No thank you, sir. The Court has ruled.

(Whereupon, at 2:07 p.m., the hearing in the above-entitled case was recessed.)

* * *

REPORTER'S CERTIFICATE

This record is certified by the undersigned to be the official transcript in the above-entitled case.

MINDI L. COLCHICO
Official Court Reporter



## APPENDIX C

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## ORDER GRANTING SUMMARY JUDGMENT APPEALED

*United States District Court for the District of Columbia*

*Civil Action No. 80-2232*

*Judge Richey*

*Filed July 21, 1982*

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*Myrtle Nell Catrett,*
*Administratrix of the Estate of Louis H. Catrett*

*Plaintiff,*

*v.*

*Johns-Manville Sales Corp., et al.*

*Defendants.*

---

ORDER

Upon consideration of the Motion by Defendant Celotex Corporation for Summary Judgment, and upon consideration of the entire record herein, it is by the Court this 21st day of July, 1982,

ORDERED that the Motion of Defendant Celotex Corporation for Summary Judgment is granted; and it is further

ORDERED that the Complaint is dismissed as to defendant Celotex Corporation with prejudice.

CHARLES R. RICHEY,
Judge.

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## APPENDIX D

*United States Court of Appeals*
*for the District of Columbia Circuit*

*September Term, 1984*

*Filed May 7, 1985*

*No. 83-1694*

*Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, Deceased*

*v.*

*Johns-Manville Sales Corporation, et al.*

*BEFORE: Wald, Bork and Starr, Circuit Judges*

### ORDER

Upon consideration of appellee's petition for rehearing, filed April 5, 1985, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

For The Court
GEORGE A. FISHER, Clerk

By: ROBERT A. BONNER
Chief Deputy Clerk.

## APPENDIX E

*United States Court of Appeals*
*for the District of Columbia Circuit*

*September Term, 1984*

*Filed May 7, 1985*

*No. 83-1694*

*Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, Deceased*

*v.*

*Johns-Manville Sales Corporation, et al.*

*BEFORE:* *Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges*



## ORDER

Appellee's suggestion for rehearing *en banc,* filed April 5, 1985, has been circulated to the full Court. A majority of the judges in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

*Per Curiam*

For The Court
GEORGE A. FISHER, Clerk

By: ROBERT A. BONNER
Chief Deputy Clerk.

Circuit Judges Ginsburg, Bork and Scalia would grant the suggestion.

Circuit Judge Mikva did not participate in this order.

## APPENDIX F

### Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated On Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practical ascertain what material facts exist without substantial controversy and what material



facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered againt him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

# OPPOSITION

# BRIEF

No. 85-198

Supreme Court, U.S.
FILED
SEP 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

THE CELOTEX CORPORATION,

*Petitioner,*

v.

MYRTLE NELL CATRETT, ADMINISTRATRIX OF THE ESTATE OF LOUIS H. CATRETT, DECEASED,

*Respondent.*

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETER T. NICHOLL,*
JAMES F. GREEN,
PETER T. ENSLEIN,
ASHCRAFT & GEREL,
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Counsel for Respondent,
Myrtle Nell Catrett.

** Counsel of Record*

The Daily Record Co., Baltimore, MD 21202

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No. 85-198

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

THE CELOTEX CORPORATION,

*Petitioner,*

v.

MYRTLE NELL CATRETT, ADMINISTRATRIX OF THE ESTATE OF LOUIS H. CATRETT, DECEASED,

*Respondent.*

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this matter.

## OPINIONS BELOW

The District Court's ruling granting summary judgment to Petitioner was issued from the bench during the oral

argument and is unreported. The transcript is Petitioner's Appendix B; the District Court's Order is Petitioner's Appendix C.

The decision of the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's grant of summary judgment and remanded to the District Court for further proceedings. The Court of Appeals opinion is reported at 756 F.2d 181 and appears as Petitioner's Appendix A. The Court of Appeals Order denying Petitioner's Petition for Rehearing appears as Petitioner's Appendix D. The Court of Appeals Order denying Petitioner's Suggestion for Rehearing *En Banc* appears as Petitioner's Appendix F.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1985. On May 7, 1985, the Court of Appeals filed Orders denying Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Petition for Writ of Certiorari was filed in the United States Supreme Court on August 5, 1985. Petitioner seeks to invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1254(1). Respondent agrees with the applicability of that provision.

## QUESTIONS PRESENTED

1. Whether the moving party, on a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure, must support its motion with some evidence when the pleadings, answers to interrogatories and admissions on file, at the time the motion is heard, show that there is a genuine issue as to material facts.

2. Whether, in a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure, the moving party's burden of proving that there is no genuine issue as to any material fact and that the moving party is



entitled to judgment as a matter of law, can ever be shifted to the non-moving party in the absence of evidence presented by the moving party.

## STATUTORY PROVISIONS INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure.

## STATEMENT OF THE CASE

Respondent in this action, Myrtle Nell Catrett, widow of Louis H. Catrett and Administratrix of his estate, in September, 1980 filed a wrongful death and survival action in the United States District Court for the District of Columbia, naming fifteen corporate defendants. Each defendant manufactured or distributed asbestos and asbestos containing products.

The complaint was based on negligence, breach of warranty and strict liability. The complaint alleged that Louis H. Catrett, an asbestos insulator, contracted malignant peritoneal mesothelioma and died on September 3, 1979 as a result of his exposure to products containing asbestos which were manufactured and distributed by defendants.

Petitioner, The Celotex Corporation (Celotex), filed a Motion for Summary Judgment on September 28, 1981. The motion was merely supported by a Memorandum of Points & Authorities and a Statement of Material Facts. The Celotex motion was withdrawn on November 9, 1981 and refiled on December 23, 1981, again, simply supported by a Memorandum of Points & Authorities and a Statement of Material Facts.

The Celotex motion was premised on the allegation that plaintiff (Respondent) had failed to produce any evidence that any product designed, manufactured, or distributed

by Celotex was the proximate cause of the injuries alleged in the complaint.

On January 4, 1982, Mrs. Catrett filed a Motion in Opposition to Celotex's Motion for Summary Judgment. In support of her motion, Mrs. Catrett filed a Memorandum of Points & Authorities, a Statement of Genuine Issues and three documents which indicated that Louis H. Catrett was exposed, in Chicago, Illinois, to an asbestos containing product which was manufactured by Celotex. On February 1, 1982, Mrs. Catrett filed Supplemental Answers to Interrogatories which named three individuals whom plaintiff intended to call as witnesses at trial. Each witness had personal knowledge of Mr. Catrett's exposure to a Celotex manufactured asbestos product. One of the name witnesses was the author of one of the documents presented in support of Mrs. Catrett's Motion in Opposition to Summary Judgment.

The District Court heard oral argument on July 21, 1982 and, ruling from the bench, granted Celotex's Motion for Summary Judgment. Mrs. Catrett filed a Notice of Appeal with the Clerk of the United States District Court for the District of Columbia on June 16, 1983.

The Court of Appeals reversed the District Court's ruling and remanded to the District Court for further proceedings. The Court of Appeals held that "the defendant's moving papers were patently defective on their face, rendering inappropriate the grant of summary judgment." 756 F.2d at 184, Petitioner's Appendix A at 5a-6a. The Court's rationale was that rather than support its motion with affidavits, declarations or any evidence, the defendant's (Petitioner's) "motion was based solely on the plaintiff's purported failure to produce credible evidence to support her claim." 756 F.2d at 184, Petitioner's Appendix A at 6a.



In support of the decision, the Appeals Court cited Rule 56 of the Federal Rules of Civil Procedure. 756 F.2d at 184, Petitioner's Appendix A at 6a-7a. Rule 56(e) states that the motion must be made and supported before the adverse party must respond to the allegations. The Advisory Committee Note to Rule 56 states that a motion for summary judgment must be denied "'[w]here the *evidentiary matter in support of the motion* does not establish the absence of a genuine issue.'" 756 F.2d at 184, Petitioner's Appendix A at 7a.

In further support of the decision, the Court of Appeals cited a long line of United States Supreme Court and Circuit Court for the District of Columbia Circuit decisions. Each decision specifically held that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 756 F.2d at 184, Petitioner's Appendix A at 7a.

The dissent, by Judge Bork, would not have reversed the District Court's decision. Judge Bork opined that, as a summary judgment is similar to a directed verdict, the moving party may prevail even when it has produced no evidence. 756 F.2d at 188, Petitioner's Appendix A at 15a-16a. The dissent's second argument is premised on the trial judge's ability to grant summary judgment *sua sponte* if the losing party is on notice to come forward with evidence. Judge Bork further opined that that trial judge's discretion to manage his or her case load permits a narrowing of issues and factual disputes. The final argument asserted in the dissent was that a moving party, in a motion for summary judgment, has no obligation to produce positive evidence proving the absence of a genuine factual dispute. 756 F.2d at 190, Petitioner's Appendix at 18a-19a.

The Court of Appeals denied Petitioner's Petition for Rehearing as well as their Suggestion for Rehearing *En Banc*. Petitioner's Appendices D & E at 45a-47a.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I.

**THE PETITION FOR WRIT OF CERTIORARI IS WITHOUT JUSTIFICATION BECAUSE THE CIRCUIT COURT'S DECISION GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY IN ACCORDANCE WITH AN UNBROKEN LINE OF AUTHORITY FROM THIS COURT AS WELL AS FROM THE DISTRICT OF COLUMBIA CIRCUIT.**

The Court of Appeals held that Celotex's Motion for Summary Judgment was "patently defective on [its] face" as it was "based solely on the plaintiff's purported failure to produce credible evidence to support her claim." *Catrett*, 756 F.2d at 184, Petitioner's Appendix A at 5a-6a. In support of its decision the Court of Appeals cited a long line of decisions from the United States Supreme Court and United States Court of Appeals for the District of Columbia Circuit. *Id.* 756 F.2d at 184 n.10, Petitioner's Appendix A at 7a-8a.

The law is well settled in the United States Supreme Court and the District of Columbia Circuit. The party opposing a motion for summary judgment is required to come forward with rebuttal evidence only after the moving party has met its burden of showing the absence of genuine issues of material fact. See, e.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968); *Davis v. Chevy Chase Financial, Ltd.*, 667 F.2d 160, 172 (D.C. Cir. 1981); *Weisberg v. United States Department of Justice*, 627 F.2d 365, 368 (D.C. 1980); *Bloomgarden v. Coyer*, 479 F.2d 201, 206-07 (D.C. Cir. 1973).



It is equally well settled that the movant's papers are held to a stringent standard while the respondent's papers are treated with leniency. See, e.g., *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir. 1981) quoting C. Wright & A. Miller, *Federal Practice & Procedure*, § 2727 at 524-30 (1973); *Washington v. Cameron*, 411 F.2d 705, 710 (D.C. Cir. 1969).

Respondent respectfully submits that if this court were to accept Petitioner's argument absurd results would necessarily flow. Petitioner has suggested that where the moving party, in a motion for summary judgment, is unable to adduce any support the burden should be shifted to the non-moving party. Such a rule not only has no support in the law, the results would be chaotic and undermine the purpose of summary judgment.

### II.

**THE ALLEGEDLY CONFLICTING DECISIONS RELIED ON BY PETITIONER ARE DISTINGUISHABLE ON THEIR FACTS AND RECONCILABLE; THE CONFLICT IS THEREFORE ILLUSORY AND RENDERS A GRANT OF CERTIORARI INAPPROPRIATE.**

It is well settled law that the purpose of a motion for summary judgment is to determine whether a triable issue exists. See, e.g., *Weiss v. Kay Jewelry Stores, Inc.*, 470 F.2d 1259 (D.C. Cir. 1972). It is also well settled that the moving party carries the burden of proving that no genuine issue of fact exists, even where his opponent would carry the burden at trial. See, e.g., *Doff v. Brunswick Corp.*, 372 F.2d 801, 805 (9th Cir.) *cert. denied*, 389 U.S. 144 (1966); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962); *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962); *United States v. General Motors Corp.*, 565 F.2d 754 (D.C. Cir. 1977); *Rodway v. United States Department of Agriculture*, 482 F.2d 722 (D.C. Cir. 1973).

In the case at bar, Petitioner wishes to alter the well settled principles regarding summary judgments. Petitioner would have its burden shifted to the non-moving party on the basis of the fact that, as the movant, it is incapable of meeting its burden. Petitioner argues that the Court of Appeals improperly held that as movant, its motion for summary judgment required some support. In support of its position, Petitioner argues that the Court of Appeals decision contradicts precedent of the District of Columbia Circuit as well as the Third Circuit. Respondent asserts that any alleged conflict of decisions is distinguishable on the facts and reconcilable.

In *Reynolds v. Needles,* 132 F.2d 161, 162 (D.C. Cir. 1942) the United States Court of Appeals for the District of Columbia Circuit stated that no affidavits are required in support of a motion for summary judgment. Affidavits are not at issue in the case at bar as neither party submitted affidavits. Furthermore, the Court of Appeals decision in *Catrett* did not state that Rule 56 required affidavits. Rather, the Court of Appeals stated, and the issue at bar, is whether the movant must adduce some support for its motion.

The nature of the moving party's burden is discussed in the dicta of *In Re Japanese Electronic Products,* 723 F.2d 238, 257-59 (3d Cir. 1983). The Third Circuit stated that "the Rule 56 inquiry is whether the admissible evidence, in the record in whatever form, from whatever source, considered in the light most favorable to the respondent to the motion, fails to establish a prima facie case or defense." *Id.* 723 F.2d at 258. Further, "[t]he court may consider 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any . . .'" *Id.* 723 F.2d at 258 quoting Fed. R. Civ. Pro. 56(c); see, also, 6 J. Moore, *Moore's Federal Practice,* ¶56.15 [3] at 56-477 to 78 (1976).



In the case at bar the plaintiff's supplemental answers to interrogatories supplied the names of persons with knowledge and facts relevant to the decedent's exposure to defendant's products. (Court of Appeals R.E. p. 123a-124a). Plaintiff further stated that she intended to call these individuals as witnesses at trial. Furthermore, in plaintiff's Response in Opposition to Celotex's Motion for Summary Judgment, she attached a copy of a letter authored by one of these named witnesses. The letter clearly indicated that plaintiff's decedent was exposed to a Celotex product. In light of the pleadings and answers to interrogatories on file, Petitioner's failure to support its motion for summary judgment rendered it blatantly insufficient.

Petitioner quoted a footnote in *Lee v. Flintkote Co.,* 593 F.2d 1275, 1282 n.37 (D.C. Cir. 1979) for the purpose of demonstrating that the restrictive view of summary judgment has been criticized by one law review author. Petitioner's Brief at 7-8. The note further states, however, that regardless of any critique, the court must follow controlling precedent. *Id.* citing *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 158 (1970); Fed. R. Civ. P. 56(c).

The second portion of Petitioner's argument states that the Court of Appeals decision contradicts precedent that the nonmoving party cannot oppose a motion for summary judgment with evidence inadmissible at trial. The purported contradiction, in the decisions which Petitioner has relied for support, may easily be reconciled on the facts, thereby rendering the alleged conflict illusory.

In *Dyer v. MacDougall,* 201 F.2d 265, 268 (2d Cir. 1952) the Second Circuit acknowledged that the defendant, as movant, had the burden and stated "if the defendants on their motion succeeded in proving that the plaintiff would not have enough evidence to go to the jury on the issue the judgment was right." The trial court found the defendant

met its burden and then, in shifting the burden to plaintiff, found that plaintiff's evidence was inadmissible. *Id.* 201 F.2d at 268-69.

*Dyer* is distinguishable from the case at bar on two major factual issues. First, the Court of Appeals explicitly found that Celotex, as movant, had not met its burden; therefore the burden would never shift to plaintiff, as non-moving party. Second, neither the trial court nor the Court of Appeals, explicitly or implicitly, found that the plaintiff's evidence was inadmissible.

The Ninth Circuit decision, cited by Petitioner, *Ramsey v. United States,* 329 F.2d 432, 436 (9th Cir. 1964) supports the Court of Appeals' decision. The Ninth Circuit stated that while failure to file affidavits in support of a motion for summary judgment is not fatal, some support is necessary.

## III.

**ANY REMAINING ISSUES, NOT ADDRESSED BY THE COURT BELOW, ARE EVIDENTIARY IN NATURE TO BE GUIDED BY FAMILIAR RULES OF EVIDENCE AND, THEREFORE, ARE NOT SUBSTANTIAL QUESTIONS WHICH WARRANT THIS COURT'S REVIEW.**

Petitioner has suggested that this case warrants review by this Court as the Court of Appeals decision purportedly contradicts case law holding that a party cannot oppose summary judgment with evidence that would not be admissible at trial.

The Court of Appeals never addressed the evidentiary issue. "We need not, however, reach the evidentiary issue, inasmuch as defendant's moving papers were patently defective on their face." *Catrett,* 756 F.2d at 184, Petitioner's Appendix A at 5a. As the court below made no specific findings regarding the admissibility of plaintiff's evidence, the issue is rendered moot and not one which



requires the exercise of this Court's extraordinary and discretionary jurisdiction.

## CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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# JOINT

# APPENDIX

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Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-198

In The

# Supreme Court of the United States

October Term, 1985

THE CELOTEX CORPORATION,

*Petitioner,*

v.

MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## JOINT APPENDIX

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**Petition for Certiorari filed on August 5, 1985**
**Certiorari granted on November 4, 1985**

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-2232

(Filed September 2, 1980)

HART, J.

MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased
2217 Naylor Road, S.E.
Washington, DC 20020
Plaintiff

vs.

JOHNS-MANVILLE SALES CORPORATION
12999 Deer Creek Canyon Rd.
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C.T. Corporation Systems
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and

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SERVE:
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and

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SERVE:
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and

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SERVE:
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Defendants

PLAINTIFF'S ORIGINAL COMPLAINT

(Wrongful Death and Survival Action)

COUNT I

1. Jurisdiction of this Court is based upon diversity of citizenship and amount, 28 United States Code § 1332.

The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

2. This claim for relief arose in the District of Columbia and thus venue properly lies with this Court pursuant to 28 United States Code § 1391(a).

3. This action arises under Title 16, Section 2701, *et seq.* of the District of Columbia Code, as amended, and is brought by Myrtle Nell Catrett, a citizen of the District of Columbia, duly appointed administratrix of the Estate of Louis H. Catrett, Deceased.

4. The defendants in this action are as follows:

(A) JOHNS-MANVILLE SALES CORPORATION is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation may be served through its registered agent, C.T. Corporation Systems, 918 - 16th Street, N.W., Washington, DC.

(B) OWENS-CORNING FIBERGLASS CORPORATION is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation may be served through its registered agent, C.T. Corporation Systems, 918 - 16th Street, N.W., Washington, DC.

(C) ARMSTRONG CORK COMPANY is a Pennsylvania corporation with its principal place of business in a state other than the District of Columbia; this corporation may be served through its reigstered agent, C.T. Corporation Systems, 918 - 16th Street, N.W., Washington, DC.



(D) GAF CORPORATION is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation may be served through its registered agent, C.T. Corporation Systems, 918 - 16th Street, N.W., Washington, DC.

(E) THE CELOTEX CORPORATION is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation may be served through its registered agent, C.T. Corporation Systems, 918 - 16th Street, N.W., Washington, DC.

(F) KEENE CORPORATION is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation may be served through its registered agent, Prentice Hall Corporation Systems, Inc., 1701 Pennsylvania Avenue, N.W., Washington, DC.

(G) EAGLE PITCHER INDUSTRIES, INC. is an Ohio corporation with its principal place of business in a state other than the District of Columbia; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate headquarters, 580 Walnut Street, P.O. Box 779, Cincinnati, Ohio 45201.

(H) FIBREBOARD CORPORATION is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate headquarters, 1300 S.W. 5th Avenue, Portland, Oregon 97201.

(I) NICOLET, INC. is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate headquarters, 25 Skippack Pike, Ambler, Pennsylvania.

(J) PITTSBURGH CORNING CORPORATION is a Pennsylvania corporation with its principal place of business in a state other than the District of Columbia; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate headquarters, 800 Presqueisle Drive, Pittsburgh, Pennsylvania 15239.

(K) RAYBESTOS-MANHATTAN, INC. is a Connecticut Corporation with its principal place of business in a state other than the District of Columbia; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate headquarters, 100 Oakview Drive, Turnbull, Connecticut.

(L) UNARCO INDUSTRIES, INC. is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate headquarters, 332 S. Michigan Avenue, Chicago, Illinois 60604.

(M) FORTY-EIGHT INSULATIONS, INC. is an Illinois corporation with its principal place of business in a state other than the District of Columbia; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate



headquarters, Route 25, North Aurora, Aurora, Illinois 60542.

(N) SOUTHERN TEXTILE CORPORATION is a Delaware corporation with its principal place of business in a state other than the District of Columbia; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate headquarters, 1000 Seabord Street, Charlotte, North Carolina 28237.

(O) TURNER & NEWALL is an England corporation with its principal place of business in a country other than the United States; this corporation does not maintain a registered agent in the District of Columbia and may be served at its corporate headquarters, 20 St. Mary's Parsonage, Manchester M3 2NL England.

5. The deceased, Louis H. Catrett, was employed an (sic) an asbestos insulation installer from 1957 to 1972 primarily in the District of Columbia. During that entire period of time, he used, installed, removed and frequently came into contact with asbestos and asbestos products designed, manufactured and distributed by the defendants named in paragraph 4 above. Because of this frequent contact with the defendants' asbestos products, the deceased inhaled and ingested great quantities of asbestos fibers. Louis H. Catrett died on September 3, 1979 at the age of 54 from asbestosis and malignant mesothelioma. Myrtle Nell Catrett is the widow of Louis H. Catrett and is the duly appointed administratrix of his estate.

6. The death of Louis H. Catrett was a direct and proximate result of the negligence of the defendants here-

in in their design, manufacture, production, testing, and labeling of asbestos materials and products, including, but not limited to, negligence in:

(A) failing to adequately warn the deceased of the hazards associated with the inhalation of asbestos fibers;

(B) failing to adequately warn the deceased that protective equipment should be used when working with products containing asbestos;

(C) failing to properly design and manufacture asbestos products for safe use under the conditions of use that were reasonably anticipated;

(D) failing to properly test the asbestos products for hazards prior to placing these goods in commerce;

(E) failing to provide instructions for the safe and proper use of asbestos products;

(F) failing to remove asbestos products from the stream of commerce even after the defendants knew, or in the exercise of reasonable care should have known, that these products were unsafe for use by consumers under any circumstances.

7. The death of Louis H. Catrett was a direct and proximate result of the breach of express warranties made by the defendants herein, in that the asbestos products used by the deceased were expressly warranted as safe, and the deceased relied upon these express warranties of the defendants. However, the asbestos products as designed, manufactured, and distributed by the defendants



herein were not safe for use by the deceased, but rather caused the disabling and eventually fatal injuries suffered by Louis H. Catrett.

8. The death of Louis H. Catrett was a direct and proximate result of the breach of the implied warranty of fitness made by the defendants herein, in that the asbestos products used by the deceased were impliedly warranted by the defendants to be fit for their intended purposes and uses, and the deceased relied upon the defendants' skill and judgment and the implied warranties made by the defendants. However, the asbestos products as designed, manufactured, and distributed by the defendants herein were not fit for use for their intended purposes, but rather caused the disabling and eventually fatal injuries suffered by Mr. Catrett.

9. The death of Louis H. Catrett was a direct and proximate result of the breach of the implied warranty of merchantability made by the defendants herein, in that the asbestos products used by the deceased were impliedly warranted by the defendants to be of merchantable quality, fit, safe and in proper condition for the ordinary use for which asbestos products are designed and used, and the deceased relied upon the defendants' skill and judgment and the implied warranty of merchantability made by the defendants. However, the asbestos products as designed, manufactured and distributed by the defendants herein were unfit, unsafe, and unusable for the purposes for which they were intended, but rather caused the disabling and eventually fatal injuries suffered by Mr. Catrett.

19. (sic) The death of Louis H. Catrett was a direct and proximate result of the design, manufacture, and sale

by the defendants herein of asbestos products which were defective and unreasonably dangerous to the user or consumer. Each of the defendants named in paragraph 4 above is engaged in the business of designing, manufacturing and selling of asbestos products, and the asbestos products that caused injury to the deceased reached him without substantial change in the condition in which they were sold. The deceased was unaware of the dangerous propensities of the asbestos products which rendered them unsafe for their intended use, and at the time he used these products, such use was in a manner that was reasonably anticipated by the defendants.

11. As a direct result of the negligence, breach of warranties, and strict liability of the defendants herein, the deceased, Louis H. Catrett, developed malignant mesothelioma, asbestosis, and other pulmonary ailments which resulted in his death on September 3, 1979. These injuries caused his total disability for a period prior to his death, and furthermore caused the decedent to suffer extreme physical pain and mental anguish, as well as to incur substantial expenses for medical care and attention.

12. As a further direct result of the negligence, breach of warranties, and strict liability of the defendants herein, the female plaintiff and next of kin have incurred burial and related expenses, and have sustained and will continue to sustain great pecuniary loss.

WHEREFORE, the plaintiff, Myrtle Nell Catrett, demands judgment against the defendants, jointly and severally, in the full and just amount of One Million Dollars ($1,000,000.00), plus interest and costs.



## COUNT II

1. This action arises under Title 12, Section 101, *et seq.* of the District of Columbia Code, as amended, and is brought by Myrtle Nell Catrett, duly appointed administratrix of the Estate of Louis H. Catrett, Deceased.

2. The plaintiff hereby adopts, by reference, all of the allegations in Count I, above, and further alleges that the decedent had been regularly and gainfully employed prior to suffering the injuries that resulted in his death, and had been so employed for many years, and but for the negligence, breach of warranties, and strict liability of the defendants herein, would have continued to be so employed.

3. As a direct and proximate result of the negligence, breach of warranties, and strict liability of the defendants, the estate of the deceased has been deprived of all the probable future earnings of the decedent.

4. As a further direct and proximate result of the negligence, breach of warranties, and strict liability of the defendants, the estate of the deceased has incurred substantial expenses for the medical care and attention rendered to the deceased prior to his death.

WHEREFORE, the plaintiff, Myrtle Nell Catrett, demands judgment against the defendants, jointly and severally, in the full and just amount of One Million Dollars ($1,000,000.00), plus interest and costs.

## COUNT III

1. This action arises under Title 12, Section 101, *et seq.* of the District of Columbia Code as amended, and is

brought by Myrtle Nell Catrett, duly appointed administratrix of the estate of Louis H. Catrett, Deceased.

2. The plaintiff hereby adopts, by reference, all of the allegations in Counts I and II, above, and further alleges that the illness, injury and damage suffered by the deceased, Louis H. Catrett, was a direct result of conduct on the part of the defendants herein which was intentional; or so reckless, willful and wanton in nature as to rise to the level of intentional action by these defendants, exhibiting reckless indifference to the health and well-being of the deceased and other similarly situated workers, and in reckless disregard for the consequences the defendants knew or should have known would result from their actions.

3. The plaintiff hereby adopts, by reference, all of the allegations in Counts I and II, above, and further alleges that the illness, injury and damage suffered by the deceased, Louis H. Catrett, was a direct result of conduct on the part of the defendants that amounted to fraudulent representation concerning the safety of asbestos products, and the safety of working in an environment containing asbestos fibers; such representation having been made despite defendants' knowledge that these products and this work environment were wholly unsafe, dangerous and hazardous to the health of the deceased and other similarly situated workers.

WHEREFORE, the plaintiff, Myrtle Nell Catrett, demands judgment for punitive damages against the defendants, jointly and severally, in the full and just amount



of Two Million Dollars ($2,000,000.00), plus interest and costs.

Respectfully submitted,

ASHCRAFT & GEREL

By: /s/ James A. Mannino

By: /s/ James F. Green

By: /s/ Kevin B. Byrd
2101 L Street, N.W.—Suite 303
Washington, DC 20037
(202) 783-6400

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands that all issues of fact in this case be tried to properly empanelled jury.

/s/ James F. Green

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION NO. 80-2232

JUDGE HART

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett,
Deceased

Plaintiff

v.

JOHNS-MANVILLE SALES CORP., et al

ANSWER

(Filed October 3, 1980)

COMES NOW the Defendant, the Celotex Corporation, by and through its counsel, and for answer to the Complaint filed herein states as follows:

FIRST DEFENSE

This Defendant states that the action is barred by the applicable statute of limitations.

SECOND DEFENSE

This Defendant states that the Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

This Defendant states that the Court is without jurisdiction to maintain cognizance over this matter.

FOURTH DEFENSE

This Defendant states that the injuries, death, and damages alleged to have been sustained by the deceased, were the direct and proximate result of his sole or contributory negligence.



FIFTH DEFENSE

This Defendant further asserts the affirmative defenses of assumption of the risk, misuse of the product by the deceased and further reserves the right to assert any additional affirmative defenses which may become available as discovery proceeds.

SIXTH DEFENSE

COUNT I

1. This Defendant denies the allegations contained in paragraphs 1, 2, 3, 6A, 6B, 6C, 6E, 6F, 7, 8, 9, 10, 11 and 12 of Count I of the Complaint and demands strict proof thereof.

2. The Defendant is without sufficient information upon which it can form a belief as to the allegations contained in paragraphs 4A, 4B, 4C, 4D, 4E, 4F, 4G, 4H, 4I, 4J, 4K, 4L, 4M, 4N and 5 of the Complaint and therefore denies same.

COUNT II

3. The Defendant denies the allegations contained in paragraphs 1, 3, and 4 of Count II of the Complaint and demands strict proof thereof.

4. This Defendant hereby incorporates, by reference, its answers to all paragraphs contained in Count I of the Complaint in answer to paragraph 2 of Count II of the Complaint and further denies the remaining allegations contained in paragraph 2 of Count II of the Complaint and demands strict proof thereof.

COUNT III

5. This Defendant denies the allegations contained in paragraphs 1 and 3 of Count III of the Complaint.

6. This Defendant hereby incorporates, by reference, all of its answers to Counts I and II in response to the allegations contained in paragraph 2 of Count III and further denies the remaining allegations contained in paragraph 2 of Count III and demands strict proof thereof.

WHEREFORE, having fully answered all allegations contained in the Complaint filed herein, this Defendant prays that the same be dismissed with costs expended.

The Celotex Corporation
By Counsel

HADEN, RHATIGAN & MCMURTRIE, P.C.
8150 Leesburg Pike, Suite 503
Vienna, Virginia 22180
(703) 821-0821
By: /s/ William G. McMurtrie
(#207720)

(Certificate of Service omitted in printing)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis R. (sic)
Catrett, Deceased

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
et al

Defendants

REQUEST FOR PRODUCTION OF DOCUMENTS

(Filed October 17, 1980)

COMES NOW the defendant, Celotex Corporation, by counsel, pursuant to the Federal Rules of Procedure and the Rules of this Court, and requests that the plaintiff produce, for inspection and/or copying at the offices of counsel for the plaintiff, on November 19, 1980 at 10:00 a.m., the following:

1. All purchasing records from all employers of Louis R. (sic) Catrett that show purchases of any and all products of this defendant or any of its subsidiary corporations.

2. Copies of all Federal and State or District of Columbia income tax returns filed by and on behalf of decedent, or, alternatively, an authorization to this defendant to obtain copies of same.

3. All damage studies, damage reports or damage analysis, or any and all other documents containing any mention of facts or opinions which related to the Plain-

tiff's claim for damages suffered as a result of the alleged acts of any of the defendants.

4. All correspondence between Celotex Corporation and any other person which you contend relates to any matter at issue in this litigation.

5. All correspondence between any defendant in this litigation and any other person which you contend relates to any matter at issue in this litigation.

6. All documents which relate to or identify asbestos containing materials with which the decedent, Louis R. Catrett, may have worked.

7. All packaging materials which the plaintiff alleges were used in packaging asbestos-containing materials.

8. All medical, doctor or hospital records, summaries, test results, or other records of any type which relate to the medical history of the decedent, Louis R. Catrett.

9. All x-rays which have ever been taken of the decedent, Louis R. Catrett.

10. Louis R. Catrett's social security administration print-out and work record.

11. All documents which relate to this defendant's knowledge that exposure to its products would cause disease and injury.

12. All documents which relate to scientific and medical data that tend to show that exposure to asbestos products is harmful and deadly.

13. All documents which relate to this defendant's products constituting a serious health record.



14. All documents relating to or pertaining in any Workmen's Compensation Commission claims filed in any jurisdiction.

15. All documents relating to or pertaining to any Workmen's Compensation claims filed in any jurisdiction by any employee of this Defendant.

CELOTEX CORPORATION
By Counsel

HADEN, RHATIGAN & MCMURTRIE, P.C.
8150 Leesburg Pike
Suite 503
Vienna, Virginia 22180
(703) 821-0821
By: /s/ William G. McMurtrie
(#207720)
Counsel for Defendant Celotex

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 80-2232

Judge Hart

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased

Plaintiff,

vs.

JOHNS-MANVILLE SALES CORPORATION, *et al.*

Defendants.

## ANSWERS TO INTERROGATORIES

(Filed June 29, 1981)

Comes now plaintiff, MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, and answers the Interrogatories propounded by defendants as follows:

*Interrogatory No. 1:* State all names by which you have been known; the date and place of birth; occupation; Social Security number.

*Answer:* Louis H. Catrett, Jr.
03/16/25
Bay Minette, Alabama
416-26-2960

*Interrogatory No. 2:* State the address of each place of residence that you have occupied from age 16 to date.

*Answer:* 1947-1950 — Second Avenue
Miami, Florida

1951-1954 — 3300 Block Mt. Pleasant Street,
N.W., Washington, D.C.

1955-1960 — 3224 E Street, S.E.
Washington, D.C.



1960-Pres—2217 Naylor Road, S.E.
Washington, D.C. 20020

*Interrogatory No. 3:* State the names, ages, and present address of any children, identifying of which marriage if by different marriages.

*Answer:* Clytie Catrett, 32 years of age
Reston, Virginia

Louis Catrett, 27 years of age
2217 Naylor Raod (sic), S.E.,
Washington, D.C. 20020

Dennis Catrett, 24 years of age
Alexandria, Virginia

David Catrett, 19 years of age
2217 Naylor Road, S.E., Washington, D.C. 20020

All of the aforementioned are children of
Myrtle and Louis Catrett

*Interrogatory No. 4:* Identify all persons dependent upon you or who have been dependent upon you, setting forth the inclusive dates of such dependency and the nature of such dependency, i.e., dependent, meaning financial support and maintenance or otherwise. As to each dependent, set forth whether totally or partially dependent and extent of any partial dependency.

*Answer:* David Catrett
Dependent for schooling expenses incurred at
Prince George's Community College

David Catrett receives $419.00 per month
from Social Security.

Mrs. Catrett pays tuition.

*Interrogatory No. 5:* Set forth your schooling, including public, private, or trade schools, setting forth the dates of attendance and grade or level attended.

*Answer:* Louis Catrett — schooling
Bay Minette, Alabama 1st through 10th grades

Washington, D.C. 11th grade

*Interrogatory No. 6:* Have you ever been a member of the armed forces of the United States?

If so, state the following:

(a) The branch of the service, serial number, and highest rank held.

(b) The beginning and ending dates of your military service.

(c) The type of discharge that you received.

(d) Whether you were given a physical examination which included X-rays prior to the time you entered the service.

(e) Whether you received any injury while in the military service.

(f) Whether you sustained or incurred any illness while in the military service.

(g) Whether you were given a physical examination which included X-rays upon leaving the service.

(h) Whether you claim disability for any injury or physical condition arising out of your military service, and if so, the details thereof, including the date on which the claim was made, the nature of the claim, the claimed disability, and the disability rating if any was given you, and the compensation for such disability.

*Answer:* (a) Member of United States Navy
Serial Number: Unknown



Highest Rank: Fireman 2nd or
Fireman 1st

(b) March 1943 — December 1946

(c) Honorable discharge

(d) Myrtle Catrett has no information with respect to this question.

(e) No

(f) No

(g) Not known

(Mrs. Catrett is trying to find his discharge papers)

(h) No disability claim

*Interrogatory No. 7:* Have you ever been convicted of a felony? If so, state fully and in detail the date, place and nature of each such felony conviction.

*Answer:* No

*Interrogatory No. 8:* Have you ever been convicted of a crime involving moral turpitude? If so, state fully and in detail the date, place and nature of each such conviction.

*Answer:* No

*Interrogatory No. 9:* State the name and address of each employer for whom you have worked to date, stating as to each employer the beginning and ending dates of employment, the nature of the business of the employer, and your particular job or job function.

*Answer:* 1946-1947
Washington Navy Yard
Washington, D.C.
Boilermaker

1947 (Summer)
Moyot Lines, Inc.
4421 Southern Avenue
Bradbury Heights, Maryland
Bus Driver

1947
W. E. Havenner Plastering
3785 Nichols Avenue, S.E.
Washington, D.C.
Plasterer (Apprentice)

1947
J. W. Taylor
3220 N.W. 36th Street
Miami, Florida 33142

1948, 1949, 1950 (Intermittenly)
Bryant E. Hutchinson Construction
568 N.W. 63rd Street
Miami, Florida
Plasterer

1948
L. Halstead Plastering Construction
1037 N.W. Seventh Avenue
Miami, Florida
Plasterer

1949
Ford-Ed Corporation
217 Shoreland Building
Miami, Florida
Plasterer

1949
Phils Market
401 N.W. 62nd Street
Miami, Florida

1949
Murcelyn Barco
1151 N.E. 90th Street
Miami, Florida



1949 & 1950
Woolf Plastering Company
P. O. Box 273
Tamrani Station
Miami, Florida
Plasterer

1949
Frank Plastering Company
13150 N.W. 1st Avenue
Miami, Florida 33142
Plasterer

1949
Carl's Court, Inc.
9080 Biscoyne Boulevard
Miami, Florida

1950
S. R. Quick & Son
411 N.E. 110 Street
Miami, Florida

1950
Johnnie Jarvis
Route 1, Box 840
Cocoa, Florida 32922

1950-1951
Kraft-Murphy Company
2539 Pennsylvania Avenue, N.W.
Washington, D.C.
Plasterer, Fireproofer of Steel

1951
D. Compe & Son
2705 S. Oakland
Arlington, VA 22206

1951
McNulty Brothers Company
1780 N. Marcey Street
Chicago, Illinois 60614

1951, 1954, 1956, 1957 (Intermittently)
District Plastering, Inc.
5238 Nebraska Avenue, N.W.
Washington, D.C. 20015
Plasterer

1951
Frank Prepneit
5521 Colorado Avenue, N.W.
Washington, D.C. 20011

1951
Barnett Silverman Company
1424 K Street, N.W.
Washington, D.C.

1951
F. M. Duncan
52 Main Street
Mobile 20, Alabama

1951
Alabama Plastering Company
2852 Old Shell Road
Mobile, Alabama 36607
Plasterer

1951, 1952
James Kane & Company
511 5th Avenue
New York, NY

1952
F. P. Badolato & Son
3800 Main Street
Munhall, Pennsylvania 15120

1952, 1953, 1954, 1955, 1956 (Intermittently)
Floyd Jennings & Son
4934 Elm Street
Bethesda, Maryland 20014

1952
V. Shonka
2818 East Street
Pittsburgh, Pennsylvania



1952, 1953
Johns-Manville Sales Corporation
22 E. 40th Street
New York, NY 10016

1953, 1954
Atlantic Craftsmen, Inc.
3021 M Street, N.W.
Washington, D.C.

1954, 1956, 1957, 1959 (Intermittently)
John Hampshire, Inc.
330 W. 24th Street
Baltimore, MD 21211

1954
United Clay Products Company
919 Investment Building
Washington, D.C. 20005

1954
J. D. Martin, Inc.
11526 George Avenue
Silver Spring, Maryland

1954, 1957, 1963 (Intermittently)
W. Lee, Inc.
Ft. Myer Drive
Arlington, Virginia 22210

1955
Krafft Murphy
2302 Wisconsin Avenue, N.W.
Washington, D.C.
Fireproofer

1956
Aaron Posner
222 Channing Street
Washington, D.C.

1957
Novinger Company, Inc.
3801 Cedarcroft Place
Brentwood, Maryland 20722

1957
Bauer Company, Inc.
Port Lavach
Texas 77979

1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1972 (Intermittently)
Krafft Murphy Company
3543 W. Braddock Road
Alexandria, Virginia 22302
Fireproofer

1956
James Conroy, Inc.
1472 Broadway
New York, New York

1958, 1959, 1960, 1961, 1962 (Intermittently)
National Asbestos Company
1011 Arlington Boulevard
Arlington, Virginia 22209

1962, 1963
Lloyd Mitchell, Inc.
4650 Reisterstown Road
Baltimore, Maryland 21215

1964
Huntley & Blazier Company
2530 Via Viesta
LaJolla, California 92037

1964
Rust Engineering Company
1130 S. 22nd Street
Birmingham, Alabama 35202

1965
Fireproofing Manufacturing Corporation
1845 Jasmine Avenue
New Hyde Park, New York 11040

1965, 1966
All Purposes Fireproofing
1845 Jasmine Avenue
New Hyde Park, New York 11040



1966
Carney & Del Guidace Plastering
1845 Jamine Avenue
New Hyde Park, New York 11040

1966
Shick Tube Veyor Corporation
4346 Clary Boulevard
Kansas City, Missouri 64130

1970
Mario & DiBono Plastering, Inc.
370 Northern Boulevard
Great Neck, New York 11021
Fireproofer

1970, 1971
Anning & Johnson
1959 Arson Drive
Melrose Park, Illinois 60160
Fireproofer

1972, 1973
Blazier - Pierce
104 Eastwood
Belleville, Illinois 62223
Fireproofer & Plasterer

1973, 1974
Interior Drywall Company
2528 Pennsylvania Avenue
Pittsburgh, Pennsylvania 15222
Plasterer

1974
Floyd Jennings & Son, Inc.
4934 Elm Street
Bethesda, Maryland 20014
Plasterer

1972
Blazier Company
104 Eastwood Drive
Belleville, Illinois 62223
Fireproofer & Plasterer

1974
Blake Construction Company
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

1974, 1975
Grunley Walsh Construction Company
12221 Parklawn Drive
Rockville, Maryland 20852

1975
N. R., Inc.
116 Gates Drive
Oxon Hill, Maryland 20022

1975, 1976, 1977
Davenport Insulation Company
P. O. Box 706
Springfield, Virginia 22150

1975, 1976
Cellin Manufacturing, Inc.
9610 Gunston Cove Road
Lorton, Virginia

1974, 1975
Stephano Lozupone Sons
9801 Cable Drive
Kensington, Maryland 20795

*Interrogatory No. 10:* Have you ever been hospitalized, operated upon, or confined to an institution, including any nursing home, extended care facility, etc.?

If so, please state:

(a) The names and addresses of all such hospitals, institutions, or facilities.



(b) The beginning and ending dates of each such period of care.

(c) The nature of the illness, injury or complaint for which you were treated.

(d) The names, addresses and relationship to you or all persons who treated or examined you.

(e) The nature and extent of any permanent disabilities or residual effects from such condition for which you were treated.

(f) The nature, source and amount of any disability benefits, pensions, or other remuneration received.

*Answer:* (a) Veterans Administration Hospital
1201 N.W. 16th Street
Miami, Florida 33125

(b) Sometime in 1948.

(c) Stomach disorder.

(d) Myrtle Catrett is not in possession of such information.

(e) No known residual effects.

(f) None.

(a) Veterans Administration Hospital
2451 Fillingim Street
Mobile, Alabama 36617

(b) Sometime in 1952.

(c) Stomach disorder.

(d) Myrtle Catrett is not in possession of such information.

(e) No known residual effects.

(f) None.

(a) Washington Hospital Center
110 Irving Street, N.W.
Washington, D.C. 20010

(b) 10/18/59 through 10/26/59

(c) Probable Renal Calculus, L. side.

(d) Dr. Peiser, Surgeon, Washington Hospital Center

Dr. Penenleny, Anesthesiologist, Washington Hospital Center

(e) No known residual effects.

(f) None.

(a) Washington Hospital Center
110 Irving Street, N.W.
Washington, D.C. 20010

(b) 01/19/61 through 02/01/61

(c) Kidney Colic.

(d) Dr. C. Lenhoff, Surgeon, Washington Hospital Center

Dr. Smith, Anesthesiologist, Washington Hospital Center

(e) No known residual effects.
Right ureteral stone with extravasation of the ureter.

(f) None.

(a) Washington Hospital Center
110 Irving Street, N.W.
Washington, D.C. 20010



(b) 03/31/62 through 04/06/62

(c) Kidney Colic.

(d) Dr. C. Lenhoff, Surgeon, Washington Hospital Center

Dr. Schkolnik, Anesthesiologist, Washington Hospital Center

(e) Left Kidney stone.
No known residual effects.

(f) None.

(a) Washington Hospital Center
110 Irving Street, N.W.
Washington, D.C. 20010

(b) 08/30/67 through 09/01/67

(c) Left Femoral Hernia.

(d) Dr. Sondheimer, Surgeon, Washington Hospital Center.

(e) No known residual effects.

(f) None.

(a) Washington Hospital Center
110 Irving Street, N.W.
Washington, D.C. 20010

(b) 04/08/74 through 04/10/74

(c) Vocal Cord Lesion

(d) Dr. I. Jantman, Surgeon,
Washington Hospital Center

(e) Direct Laryngoscopy and removal of lesions on vocal cords. No known residual effects.

(f) None

(a) Sibley Memorial Hospital
5255 Loughboro Road, N.W.
Washington, D.C. 20016

(b) 12/29/78 through 01/23/79

(c) Right inguinal hernia repair
Diagnosis of upper abdominal dyskinesia

(d) Luther W. Gray, Attending Physician
3301 N. Mexico Avenue, N.W. #212
Washington, D.C. 20016

(e) Upper abdominal dyskinesia — referred back to treating physicial, Dr. Bernard Kayzen, 2645 Naylor Road, S.E., Washington, D.C. 20020 for further study.

(f) None

(a) George Washington University Hospital
901 23rd Street, N.W.
Washington, D.C. 20037

(b) 02/25/79 through 03/17/79

(c) Severe abdominal pain
Primary Diagnosis Peritoneal
Mesothelioma

(d) Dr. Neofytos Tsangaris,
Attending physician
2150 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Dr. Kenneth Goldstein,
Attending physician
1145 — 19th Street, N.W. #702
Washington, D.C. 20036

(e) Peritoneal Mesothelioma, Malignant
Totally disabled

(f) None



(a) George Washington University Hospital
901 23rd Street, N.W.
Washington, D.C. 20037

(b) 04/18/79 through 04/24/79

(c) Enlarged nodular liner

(d) Kenneth Goldstein, M.D.,
Attending physician
1145 19th Street, N.W. #702
Washington, D.C. 20036

(e) Peritoneal Mesothelioma, Malignant
Totally disabled

(f) None

(a) George Washington University Hospital
901 23rd Street, N.W.
Washington, D.C. 20037

(b) 05/22/79 through 05/24/79

(c) Mesothelioma, Metastatic
Chemotheraphy treatment

(d) M. Kornreich, M.D., Treating physician
Staff
D. O. Davis, M.D., Treating physician
Staff
E. R. Lipsit, M.D., Roentgenotogist
Staff
L. Lessin, Attending physician
Staff

(e) See above

(f) None

(a) George Washington University Hospital
901 23rd Street, N.W.
Washington, D.C. 20037

(b) 07/13/79 through 07/16/79

(c) Mesothelioma and dehydration

(d) L. Lessin, Attending physician
Staff

(e) Totally disabled

(f) None

(a) George Washington University Hospital
901 23rd Street, N.W.
Washington, D.C. 20037

(b) 07/21/79 through 07/31/79

(c) Mesothelioma, R/O Small Bowel
Obstruction

(d) L. Lessin, M.D., Attending physician

(e) Totally disabled

(f) None

(a) George Washington University Hospital
901 23rd Street, N.W.
Washington, D.C. 20037

(b) 08/20/79 through 08/24/79

(c) Mesothelioma

(d) Philip Cohen, Attending physician
Staff

(e) Totally disabled

(f) None

(a) George Washington University Hospital
901 23rd Street, N.W.
Washington, D.C. 20037

(b) 09/01/79 through 09/03/79 (Expired)

(c) Mesothelioma

(d) Philip Cohen, Attending physician
Staff

(e) N/A

(f) None



*Interrogatory No. 11:* Have you ever been an outpatient of any hospital, clinic, nursing home, extended care or other medical facility?

If so, state:

(a) The names and addresses of all such hospitals, institutions, or facilities.

(b) The beginning and ending dates of each such period of care.

(c) The nature of the illness, injury or complaint for which you were treated.

(d) The nature and extent of any permanent disabilities or residual effects from such condition for which you were treated.

(e) The nature, source and amount of disability benefits, pensions or other remuneration received.

*Answer:* No

*Interrogatory No. 12:* Have you ever suffered any personal injuries or illness other than those involved in this lawsuit? If so, state for each illness or injury:

(a) The date, place, names of persons involved and circumstances surrounding each such injury or illness.

(b) The nature and extent of the injury or illnesses, including all (sic)

(c) The nature or extent of the injuries or illnesses, including all ill effects or disabilities remaining at the time or answering these Interrogatories.

(d) The names and addresses of all persons who treated or examined you, together with date of the last treatment or examination.

(e) The nature, source and amount of any disability benefits, pensions, or other payments for such injuries or illnesses.

*Answer:* No

*Interrogatory No. 13:* Have you ever at any time made a claim for or received any health or accident insurance benefits, Workmen's Compensation payments, disability benefits, pensions, accident compensation payments or veterans' disability compensation awards. If so, state for each:

(a) The circumstances under which you received the benefits, award or payments.

(b) The illness, injury or injuries for which you received the benefits, awards or payments.

(c) The names and addresses of you (sic) employers at the time of each injury of (sic) illness for which such an award was received or claimed.

(d) The names and addresses of the examining doctors for each injury or illness.

(e) The names of the superiors, officers, boards or tribunals before which or to whom the claim or claims were made or filed, and the dates made filed.

(f) The amount of the benefits, awards or payments.

(g) The dates covering the times during which you received the benefits, awards and payments.



(h) The agencies or insurance companies from whom you received the awards, benefits, payments.

*Answer:* No

*Interrogatory No. 14:* Have you had or do you now have any health, accident, or hospitalization insurance policies (individual or group)? If so, state name, type of insurance, the address of the insurance company, the dates of commencement and expiration of coverage, policy limits, and policy number.

*Answer:* Blue Cross - Blue Shield
Health Insurance

Date of Commencement - 09/06/70

Date of Expiration—Currently effective

Policy Limits — Coverage for 365 days per admission. Supplemental coverage physician appointments — deductible — $150.00. After deductible has been met (per calendar year) Blue Cross Blue Shield will pay 80% of costs incurred, including prescriptions. Subscriber pay remaining 20%.

Policy number — R-13479127

*Interrogatory No. 15:* Which of the above policies indemnify you against the type of risk or claim upon which your complaint in this lawsuit is based? If not identified above, are there any other insurance policies indemnifying you against the type of risk or claim upon which your complaint herein is based?

If so, identify the same and state in detail:

(a) The name and address of each insurance carrier and number of each insurance policy.

(b) The amount of insurance coverage.

(c) The date of effective period of each policy.

(d) The name and address of the person or entity having possession of each insurance policy.

(e) Are you the named insured in each of the insurance policies?

(f) Describe the nature and extent of the coverage under the policy or recite in full the provisions of such policy or policies.

(g) Have you made any claim under such policy? If so, what was the result thereof?

(h) Do you intend to make any such claim under any such policy?

*Answer:* None. A workers' compensation claim for death benefits has been filed with the Department of Labor. Case No: OWCP 137167.

*Interrogatory No. 16:* Have you filed a suit or action for damages for any personal injury? If so, state:

(a) The names and addresses of all plaintiffs, defendants, other parties and their attorneys.

(b) The Court and place where each suit was filed and the date of filing.

(c) The nature and extent of the injuries claimed.

(d) The present status of each suit; and if concluded, the final result, including the amount of any settlement or judgment.

*Answer:* No.



*Interrogatory No. 17:* Have you ever had X-rays taken of your chest? If so, state the following for each set of X-rays taken:

(a) The name and address of the office or hospital where the X-rays were taken.

(b) The reason why such X-rays were taken.

(c) The date or dates on which the X-rays were taken.

(d) What was reported to you as being the X-ray diagnosis?

*Answer:* Yes. See medical records with respect to Interrogatory No. 10.

*Interrogatory No. 18:* State the dates, places and circumstances of each and every cardiological examination related to the circulatory system in any fashion conducted upon you during your lifetime. For each and every examination:

(a) Identify each prescribing physician.

(b) Identify each examining physician.

(c) Identify each medical institution in which such examinations was conducted.

(d) Identify the custodian of any results of any such examination.

(e) Set forth the interpretive or diagnostic results, conclusions, or possibilities derived from each such examination. Include in your answer the date, time, place,

source and nature of each such result, conclusion or possibility at the time that the same was made known to you or anyone related to you or acting in your behalf.

(f) Describe any treatment, recommendation or prescribed therapy resulting from such examinations, including:

1. Purpose or objective of same.

2. Success or failure of same.

3. Date, time and duration of same.

4. Name and dosage of prescribed medications.

5. Accomplishments or degree of success of such treatment, therapy, or combination thereof.

6. Whether you cooperated completely, or in part, or ignored any treatment, recommendation, prescription or course of treatment or therapy and the reasons for any such behavior on your part, other than complete cooperation.

*Answer:* See medical records with respect to Interrogatory No. 10.

*Interrogatory No. 19:* Have you at any time during your life ever used any device to reduce your possible exposure to, inhalation of, asbestos dust or fiber. If the answer is affirmative state:

(a) Make, model and type.

(b) From whom received.

(c) Company or employer requirements regarding use of such device.



(d) Company or employer recommendations regarding use of such device.

(e) Identity of all documents concerning such requirements or recommendations.

(f) Date and time of each period of use of such device.

*Answer:* Yes.

(a) Carbon canister type
Paper filter type (Depo. p. 31)

(b) Krafft - Murphy; Firebar; Mario & Di-Bono; Anning & Johnson.

(c) No requirements.

(d) No company requirements regarding use of respirators.

(e) None.

(f) Krafft - Murphy
1957 - 1963;
Fire-Bar
1963 - 1966;
Mario & DiBono
1966 - 1969;
Anning & Johnson
1970 - 1971.

*Interrogatory No. 20:* Did any of your employers ever suggest or recommend that you might or should use any device to reduce your possible exposure to, or inhalation of, asbestos dust or fibers? If your answer is yes, state:

(a) Identity of such employer.

(b) Date, time and place when such suggestion or recommendation was made.

(c) Identity of each person present when such suggestion or recommendation was made to or received by you.

(d) Identity of each person receiving same or similar suggestion or recommendation.

(e) Exact wording and content of such suggestion or recommendation and the substance thereof.

(f) Whether such suggestion or recommendation was written or oral and (sic)

1. If written, identity of each writing.

2. If oral, set forth all persons involved and details as to the manner in which such suggestion or recommendation was presented.

(g) Type, make and model of each device referred to and each such suggestion or recommendation.

(h) Nature of any action, if any, taken by you in response to such suggestion.

(i) Describe in detail your reasons for any response to such suggestions or recommendations short of complete conformity thereto.

*Answer:* No.

*Interrogatory No. 21:* Did you take any other measures or precaution to reduce exposure to or inhalation of asbestos dust, even if not using a specific device, such action including, but not limited to, use of handkerchiefs, home medications, or any other method or precaution, including



limiting your exposure thereto? Give a complete description in detail of any such precaution or measure taken by you, and identify the times or the jobs on which such precautions were used.

*Answer:* See answer to Interrogatory No. 19.

*Interrogatory No. 22:* Have you ever been confined to bed or home as a result of any injury, illness or emotional or psychological illness or distress? If so, state in detail:

(a) The dates during which you were confined to your home or bed.

(b) The address which such confinement took place.

(c) Identify those persons who have had knowledge of such confinement.

*Answer:* No.

*Interrogatory No. 23:* Have you ever had to wear any medical support, cast, brace or other device or garment, or use any other type of medical aid at any time? If so, state in detail:

(a) A description of the item.

(b) Whether it was rented or purchased.

(c) The name and address of the supplier.

(d) How much did it cost.

(e) The period of time it was used.

(f) The condition warranting such use.

*Answer:* No.

*Interrogatory No. 24:* State your average weekly or monthly earnings at the time of your last full time employment.

*Answer:* Approximately $346.44 per week.

*Interrogatory No. 25:* State fully and in detail your annual earnings for the past ten (10) years, setting forth the names of employers and amount if different employers were involved during this period of time.

(a) Identify all W-2 forms and income tax returns filed by you or on your behalf during the past ten (10) years to the present date.

(b) Produce such W-2 forms and income tax returns.

*Answer:* See attached printout from Social Security.

(a) All requested information was lost in a burglary of the Catrett home.

(b) See above.

*Interrogatory No. 26:* In regard to any person or persons having knowledge of facts relevant to the subject matter in this lawsuit:

(a) Identify the workers, including any fellow workers, foreman, superiors, etc., who have such knowledge.

(b) Identify any other persons, i.e., other than workers, who have such knowledge.

(c) Identify those persons identified whom you intend to produce as witnesses in the trial in this action.



*Answer:* Plaintiff is presently attempting to identify persons, including co-workers, foremen, and superiors, who might have knowledge of facts relevant to the subject matter of this lawsuit. Plaintiff will attempt to provide such information in Plaintiff's Supplemental Answers to Interrogatories.

*Interrogatory No. 27:* Are there any written statements from any persons having knowledge of facts relevant to the subject matter of this lawsuit, including not limited to, witnesses to your use of and exposure to asbestos and any alleged injury or condition?

(a) Identify any such statement.

*Answer:* See answer to Interrogatory No. 26.

*Interrogatory No. 28:* Do you smoke cigarettes, cigars or a pipe?

*Answer:* Louis Catrett smoked approximately 1½ packs of cigarettes per day for 20 years.

*Interrogatory No. 29:* Have you ever smoked tobacco products of any type?

*Answer:* See answer to Interrogatory No. 28.

*Interrogatory No. 30:* If your answer to either of the preceding two Interrogatories is affirmative, state in detail:

(a) The type of tobacco products which you smoked or have smoked, i.e., cigarettes, cigars, pipes., stating whether you inhale or inhaled the smoke or not.

(b) The daily frequency with which you smoke or have smoked the same, e.g., two packs of cigarettes daily; two pipefulls of tobacco daily, three cigars a day, etc.

(c) The dates and time periods during which you have smoked.

(d) For any time period during which you ceased smoking tobacco products, your reasons for stopping.

(e) For any time period when you commenced smoking tobacco products after a period of having stopped smoking, your reasons for resuming.

(f) If you smoke or have smoked cigarettes, please state the average number of packs per day so consumed in each of the years that you have smoked.

(g) Whether you were ever advised by any physician to stop smoking and if so, the date, name and adldress of each physician who gave you any such advice and whether you followed the advice. If so, for what period of time did you follow said advice?

(h) State the particular commercial brand or brands of tobacco products used by you for the periods related above.

*Answer:* (a) Cigarettes. Inhalation.

(b) 1½ packs per day.

(c) Past 20 years.

(d) Not known.

(e) Not known.

(f) 1½ packs per day.

(g) Not known.

(h) Not known.

*Interrogatory No. 31:* Are you aware of the United States Surgeon-General's warning placed on all cigarettes packages and advertisements? If so, when did you become so aware?



*Answer:* Not known.

*Interrogatory No. 32:* Have you ever read the warning referred to in the preceding Interrogatory?

*Answer:* Not known.

*Interrogatory No. 33:* Have you ever smoked cigarettes subsequent to being aware of or reading the warning referred to in the above Interrogatory?

*Answer:* Not known.

*Interrogatory No. 34:* State whether or not Plaintiff claims any permanent, total or partial disability to date or to date of death as the case may be. If so, set forth the details thereof.

*Answer:* Louis Catrett became permanently disabled on June 30, 1979 and remained so until date of death.

*Interrogatory No. 35:* State whether or not Plaintiff claims any diminution in earning power. If so, set forth the details thereof.

*Answer:* See Answer to Interrogatory No. 34.

*Interrogatory No. 36:* State in detail the time the Plaintiff claims was missed from work as a result of the conditions complained of herein.

*Answer:* See answer to Interrogatory No. 34.

*Interrogatory No. 37:* With respect to any and all special damages being claimed, set forth:

(a) The hospital bills with dates and amounts thereof.

(b) Medical bills with dates and amounts and names of persons rendering the same.

(c) Nursing bills with dates and amounts and identities of persons rendering the same.

(d) Loss of earnings, with identity of employers.

(e) Any other special damages, specifying the type, amount and nature of same. This to include any and all damages being claimed in this action, including any funeral expense where wrongful death is claimed.

*Answer:*

(a) *Hospital Bills*

Sibley Memorial Hospital
12-29-79 to 01-23-79
Total Bill - $4,109.89

George Washington University Hospital
02-14-79
Total Bill - $100.00

George Washington University Hospital
02-25-79 to 03-17-79
Total Bill - $7,212.80

George Washington University Hospital
04-18-79 to 04-24-79
Total Bill - $2,346.85

George Washington University Hospital
05-03-79
Total Bill - $115.00

George Washington University Hospital
05-15-79
Total Bill - $511.23

George Washington University Hospital
05-22-79 to 05-24-79
Total Bill - $814.86



George Washington University Hospital
07-13-79 to 07-16-79
Total Bill - $1,088.73

George Washington University Hospital
07-21-79 to 07-31-79
Total Bill - $4,474.68

George Washington University Hospital
08-04-79
Total Bill - $132.85

George Washington University Hospital
08-20-79 to 08-24-79
Total Bill - $1,507.58

George Washington University Hospital
09-01-79 to 09-03-79
Total Bill - $833.43

(b) *Medical Bills*

Bernard Katzen, M.D., F.A.A.F.P., P.C.
2645 Naylor Road, S.E.
Washington, DC 20020
12-20-78 to 08-11-79
#115 00 Total Bill

Luther W. Gray, M.D., F.A.C.S.
5840 MacArthur Blvd., N.W.
Washington, DC 20016
12-29-78 to 05-22-79
$900.00 Total Bill

Neofytos T. Tsangaris, M.D.
2150 Pennsylvania Avenue, N.W.
Washington, DC 20037
$520.00 Total Bill

(c) *Nursing Bills*

None

(d) *Loss of Earnings*

Loss of earnings will be provided in Plaintiff's Supplemental Answers to Interrogatories.

(e) *Funeral Bill*

Robert E. Wilhelm, Inc.
4308 Suitland Road
Washington, DC 20023

$2,498.00

*Interrogatory No. 38:* State whether there has been any settlement with any person or party of any claim or part of a claim being asserted herein by which any money or other benefit was received, and if so set forth the details thereof, including the claim made, the identity of the person against whom the claim is made, the identity of the person who settled the claim, the amount of the settlement and date thereof.

*Answer:* No.

*Interrogatory No. 39:* Were you a member of any labor union at any time from 1940 to present time? If so, state for each such union membership?

(a) Identity of such union.

(b) Identity of any officials known to you.

(c) Dates and time periods during which you maintained membership in such union.

*Answer:* Yes.

(a) Local 96, Plasterers

(b) Not known

(c) 1952 - Time of death

*Interrogatory No. 40:* If you were a member of the International Association of Heat and Frost Insulators and Asbestos Workers, did you receive the publication known as "The Asbestos Worker"?



*Answer:* Louis Catrett was not a member of such union.

*Interrogatory No. 41:* Did any of your employers or any union or other labor organization, group, representative, or officer ever provide or make any copies of the publication "The Asbestos Worker" available to you at any time?

*Answer:* Not known.

*Interrogatory No. 42:* Have you ever attended any international or local union meetings, seminars, conferences or conventions where the subject of occupational health and exposure to asbestos was discussed?

*Answer:* No.

*Interrogatory No. 43:* If your answer to the preceeding Interrogatry (sic) is in the affirmative, state:

(a) The date and place of such meeting, seminar, conference or convention.

(b) The name and address of the speaker.

(c) A summary of such speech, presentation or discussion.

*Answer:* Not applicable.

*Interrogatory No. 44:* Please list, together with places and dates, all offices you have held or committees on which you have served in both your local and international union.

*Answer:* None.

*Interrogatory No. 45:* Set forth each time period that your husband was an apprentice in the insulation trade (or a related trade) hereinafter referred to as "the trade".

*Answer:* 1947 - 1948

*Interrogatory No. 46:* Set forth each time period that your husband was a jouneyman (sic) or its equivalent in the trade.

*Answer:* Not known.

*Interrogatory No. 47:* State the names and addresses of all witnesses whom you presently intend to call to testify at trial. Supplement this list as you ascertain any additional witnesses.

*Answer:* 1) Myrtle Nell Catrett
2217 Naylor Road, S.E.
Washington, DC 20020

2) Co-workers of Louis Catrett.
Names and addresses will be furnished as they are ascertained.

*Interrogatory No. 48:* State the name and address of each person whom you expect to call an an expert witness at trial as to any contention whether medical, cause and effect, activity of the defendant, or any other matter for which you intend to have expert testimony.

*Answer:* Barry I. Castleman
P. O. Box 230-A, Valley Road
Knoxville, MD 21758

Bernard Katzen, M.D.
2645 Naylor Road, S.E.
Washington, DC 20020

Luther W. Gray. M.D.
5840 MacArthur Blvd., N.W.
Washington, DC 20016

Neofytos T. Tsangaris, M.D.
2150 Pennsylvania Avenue. N.W.
Washington, DC 20037

*Interrogatory No. 49:* State separately as to each expert the subject matter on which the said expert is expected to testify, state the substance of the facts and opinions to



which the expert is expected to testify, and set forth a summary of the grounds of each such opinion. Supplement this answer as you ascertain any additional witnesses.

*Answer:* Barry I. Castleman will testify as to the State of the Art with respect to asbestos.

Physicians identified in Interrogatory No. 48 will testify as to Louis Catrett's treatment prior to his death and the cause of his death.

***Interrogatory No. 50:*** Statw (sic) which magazines and/or newspapers you and/or your spouse have subscribed to and/or which you and/or your spouse regularly purchased over-the-counter for the past twenty years.

*Answer:* None.

*Interrogatory No. 51:* Please identify all past employers in whose employ your husband came into contact with asbestos or materials containing asbestos and include in your answer for each such employer: (a) name and address; (b) job title and work description; (c) identity of all of your husband's foremen or supervisors; (d) type and identity of each such asbestos material with which your husband had contact, including the trade or brand name and manufacturer if known; (e) whether the employer provided safety equipment such as respirators or masks to reduce or prevent exposure to asbestos; (f) whether the employer required that employees use safety equipment of type referred to in sub part (d) above; (g) whether the employer ever recommended that such safety equipment be used by its employees; (h) whether the employer provided showers for employees; (i) whether the employer provided separate lockers for work and

personal clothing; (j) whether company-sponsored physical examinations were required or made available. If your answer is in the affirmative, state: (1) whether required or optional; (2) frequency of examinations; (3) nature and extent of examinations; (4) whether x-ray examination was included; (5) frequency - including specific dates and times — with which your husband submitted to such examinations; (6) your husband's detailed reasons for failing to submit to such examination when required or made available; (7) results of each such examination of your husband's body; and, (8) identify the examining physician, nurse or technician.

*Answer:* Plaintiffs will attempt to supply answers to Interrogaotry (sic) No. 51 in Plaintiff's Supplemental Answers to Plaintiff's Interrogatories.

*Interrogatory No. 52:* With respect to each separate job or project on which your husband worked with or around asbestos or materials containing asbestos while employed by the persons listed in response to the preceding Interrogatory, please state separately the following as to each such job or project: (a) the name and address of the employer for whom your husband worked; (b) the location of each job (stating the plant site, city, county and state); (c) the beginning and ending dates of the job; (d) the name and the manufacturer of each and every product containing asbestos with which your husband worked or was exposed to on the particular job and a general description of each such product; (e) identify your husband's immediate supervisor or job superintendent on such job; (f) identify all persons with whom your husband worked on such job; and (g) the approximate length of time that your husband worked on each such job.



*Answer:* Plaintiffs will attempt to supply answers to Interrogatry No. 52 in Plaintiff's Supplemental Answers to Plaintiff's Interrogatories.

*Interrogatory No. 53:* Did your husband ever complete, in whole or in part, a questionnaire provided to him by any labor union, relating to the subjects of occupational health and exposure to asbestos? If your answer is in the affirmative please state as to each questionnaire: (a) the date your husband received such questionnaire; (b) the date your husband completed such questionnaire; (c) the name of the union providing such questionnaire; (d) the name and address of the individual, union or entity to whom the questionnaire was returnable; (e) whether or not you possess a copy of the questionnaire as completed by your husband; (f) name and address of each individual, union or entity possessing a copy of your husband's completed questionnaire.

*Answer:* Mrs. Catrett has no knowledge whether or not her husband ever completed a questionnaire by any labor union regarding occupational health and exposure to asbestos. (a) thru (f) not applicable.

*Interrogatory No. 54:* Did your husband ever attend any international or local union meetings, seminars, conferences or conventions where the subjects of occupational health and exposure to asbestos were discussed? If your answer is in the affirmative, please state: (a) the date and place of such meeting, seminar, conference or convention; (b) the name and address of the speaker or discussion; and (c) a summary of such speech presentation or discussion.

*Answer:* Mrs. Catrett has no knowledge whether or not her husband ever attended (sic)

(This section through item (d) duplicated in original.)

*Interrogatory No. 50:* State which magazine and/or newspapers you and/or your spouse have subscribed to and/or which you and/or your spouse regularly purchased over-the-counter for the past twenty years.

***Answer:*** None.

*Interrogatory No. 51:* Please identify all past employers in whose employ your husband came into contact with asbestos or materials containing asbestos and include in your answer for each such employer: (a) name and address; (b) job title and work description; (c) identity of all of your husband's foremen or supervisors; (d) type and identity of each such asbestos material with which your husband had contact, including the trade or brand name and manufacturer if known; (e) whether the employer provided safety equipment such as respirators or masks to reduce or prevent exposure to asbestos material; (f) whether the employer required that employees use safety equipment of type referred to in sub part (d) above; (g) whether the employer ever recommended that such safety equipment be used by its employees; (h) whether the employer provided showers for employees; (i) whether the employer provided separate lockers for work and personal clothing; (j) whether company-sponsored physical examinations were required or made available. If your answer is in the affirmative, state: (1) whether required or optional; (2) frequency of examinations; (3) nature and extent of examinations; (4) whether x-ray examination was included; (5) frequency — including specific dates and times — with which your husband submitted to such examinations; (6) your husband's detailed reasons



for failing to submit to such examination when required or made available; (7) results of each such examination of your husband's body; and, (8) identify the examining physician, nurse or technician.

***Answer:*** Plaintiffs will attempt to supply answers to Interrogatory No. 51 in Plaintiff's Supplemental Answers to Plaintiff's Interrogatories.

*Interrogatory No. 52:* With respect to each separate job or project on which your husband worked with or around asbestos or materials containing asbestos while employed by the persons listed in response to the preceding Interrogatory, please state separately the following as to each such job or project: (a) the name and address of the employer for whom your husband worked; (b) the location of each job (stating the plant site, city, county and state); (c) the beginning and ending dates of the job; (d) the name and the manufacturer of each and any international or local union meetings, seminars or conferences or conventions where the subjects of occupational health and exposure to asbestos were discussed. (a) thru (c) not applicable.

I, Myrtle Nell Catrett, by my signature below swear (affirm) that I have read the above answers and they are correct to the best of my knowledge and belief.

/s/ Myrtle Nell Catrett

Subscribed and sworn to before me this 26th day of June, 1981.

/s/ Eleanor V. Peck
Notary Public
My Commission expires
January 31, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO.: 80-2232

MYRTLE NELL CATRETT, Administratrix

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION, et al

Defendants

DEFENDANTS' MOTION TO COMPEL DISCOVERY OR IN THE ALTERNATIVE A MOTION TO DISMISS

Johns-Manville Sales Corp., one of the defendants, by their counsel and on behalf of all defendants, move, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, for an order dismissing the plaintiff's Complaint if the plaintiff fails to provide the defendants with full and complete answers to Interrogatory Nos. 9, 18, 21, 24, 26, 27, 35, 36, 37(d), 47, 49, 51 and 52 within ten days of the date of the Order granting this Motion. For reasons in support of this Motion, the defendants refer to the supporting Memorandum filed herewith, the substance of which is incorporated herein by reference.

/s/ Robert E. Scott, Jr.
Bar No: 326785

/s/ Semmes, Bowen & Semmes
1025 Connecticut Ave., N.W.
Suite 414
Washington, D.C. 20036
(202) 822-8250

Attorney for Johns-Manville
Sales Corp. & on behalf
of all Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO.: 80-2232

MYRTLE NELL CATRETT, Administratrix

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION, et al

Defendants

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY OR IN THE ALTERNATIVE TO DISMISS

Johns-Manville Sales Corporation, one of the defendants, by its attorneys and on behalf of all defendants, submits this Memorandum in support of their Motion to Dismiss filed herewith.

The Complaint in this proceeding was filed on September 2, 1980. On September 26, 1980, Johns-Manville Sales Corp. filed a set of 120 interrogatories. No answers were received from the plaintiff to these interrogatories within the period specified by the rules, and it was not until January 4, 1981 that the plaintiff filed a Motion for Protective Relief. In her Motion, the plaintiff asked the Court to require all defendants to propound one set of interrogatories. Shortly after receiving the plaintiff's Motion, counsel for all defendants and plaintiff agreed that the defendants would propound one set of interrogatories for all defendants and that each defendant would be permitted to file a limited number of interrogatories pertaining solely to their product identification. Notwithstanding the agreement reached by counsel, Judge Ritchey signed on February 3, 1981 an Order restricting

the defendants to filing a set of 90 interrogatories *including* sub-parts pertaining to matters common to all defendants. Within twenty days of receipt of the interrogatories, the plaintiff was to file answers. Thereafter, the defendants were permitted to file ten additional interrogatories pertaining to product identification within ten days of receipt of the plaintiff's answers. On February 13, 1981, the defendants propounded the master set of interrogatories. The interrogatories, pursuant to Judge Ritchey's order, were to be answered by March 5, 1981.

No answers had been received by March 6. Consequently, on March 6, 1981, counsel for Johns-Manville Sales Corp. wrote to plaintiff's counsel inquiring as to when they would receive the answers. A copy of this correspondence is attached hereto as Exhibit 1. It should be noted that the standard set of interrogatories propounded pursuant to Judge Ritchey's order were, for the most part, extracted from the set of 120 interrogatories propounded by Johns-Manville on September 26, 1980. Consequently, by that time the plaintiff had received the master set of interrogatories filed pursuant to Judge Ritchey's order, she had already had close to five months in which to collect the information needed to answer the interrogatories.

No answers were received in the weeks following defendant's letter of March 6, 1981. On June 10, 1981, counsel for Johns-Manville Sales Corp. again wrote to plaintiff's counsel insisting that answers be received by June 24, 1981. Answers to the standard set of interrogatories were eventually received on June 29, 1981.

A substantial number of critical interrogatories were either not answered or answered insufficiently. For example, Interrogatory No. 9 requests a description of the job function of the decedent for each job that he held. The plaintiff has answered with a description of 19 jobs out of a total of 58 identified. If the plaintiff has no information concerning her husband's job responsibility with the remaining employers then the defendants are entitled to an answer to that effect.



In Interrogatory No. 18 the defendants request specific information pertaining to each cardiological examination performed on the decedent during his lifetime. The plaintiff has responded generally with the direction to review the medical records attached as exhibits to Interrogatory No. 10. This answer is totally insufficient since the defendant's review of the medical records will not reveal the information requested in Interrogatory No. 18(d)(e) and (f).

Of critical importance is the plaintiff's failure to respond to Interrogatory No. 26. This interrogatory requests the plaintiff to identify all co-workers of the decedent who have knowledge pertaining to facts relevant to the case such as the products that the plaintiff was exposed to during his lifetime and the manufacturer of such products. The plaintiff has presumably been attempting to obtain this information since Johns-Manville first filed its Interrogatories on September 26, 1980. However, approximately nine months later, the plaintiff still has not failed to reveal one individual who has knowledge of such facts. The plaintiff merely states that she will "attempt to provide such information in plaintiff's Supplemental Answers to Interrogatories". For identical reasons, answer to Interrogatory No. 27 is insufficient.

Answer to Interrogatory No. 35 is insufficient in that it does not set forth the detail of the decedent's alleged diminution in earning power as requested by Interrogatory No. 36. Clearly, the plaintiff could be disabled as an insulator or plasterer as alleged in answer no. 34 yet to be able to be engaged in fulltime employment in another trade or occupation. It is an insufficient answer in response to a request for detail concerning the alleged diminution in earning power to refer to an interrogatory stating that Mr. Catrett became permanently disabled on June 30, 1979.

Answer to Interrogatory No. 37(d) has not been answered despite the extensive period of time in which the plaintiff has had to prepare her answers. The defendants are entitled to an understanding of what the plaintiff's claims for loss of earnings will be before the case progresses any further towards trial.

Answer to Interrogatory No. 47 is deficient for reasons previously stated. Plaintiff contends that it will call co-workers of Mr. Catrett, yet those names and addresses have not been furnished as of the present date. This information must be made available to the defendants immediately so that these witnesses can be deposed. Without this information, defendants will not be able to pursue discovery in this case.

Answer to Interrogatory No. 49 is insufficient in that it does not set forth in detail the substance of the facts and opinions to which Mr. Berry I. Castleman and the physicians identified in Answer No. 49 will testify. The defendants are entitled and need this information so that a determination can be made whether it is imperative to depose the plaintiff's experts.



Finally, the plaintiff has not answered Interrogatory Nos. 51 and 52. As previously stated, the plaintiff has had approximately nine months to investigate her own claim. At this point, the defendants are no further advanced in their discovery than they were when the Complaint was filed. To avoid any further delay in the resolution of this matter, the defendants are entitled to know immediately whether the plaintiff has been able to identify anyone who can testify that the decedent was exposed to a product manufactured by one or more of the defendants.

In order to expedite the discovery in this case which has slowed to a standstill, the defendants request that the Court issue an order requiring that the plaintiff supplement its answers to the above-discussed Interrogatories within ten days of the date of the order. If the plaintiff fails to file full and complete supplemental answers within the specified time period, then the defendants further request that the Court dismiss the plaintiff's claim.

/s/ Robert E. Scott, Jr.
Bar No: 326785

/s/ Semmes, Bowen & Semmes
1025 Connecticut Avenue, N.W.
Suite 414
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(202) 822-8250

Attorneys for Johns-Manville
Sales Corp. & on behalf
of all Defendants

(Certificate of Service omitted in printing)

EXHIBIT 1

SEMMES, BOWEN & SEMMES

Attorneys at Law
10 Light Street
BALTIMORE, MARYLAND 21202
Telephone 301-539-540
Telecopier 301-539-5223
Cable: Trevlac
Telex 87-478
Towson Office:
P.O. Box 6705
401 Washington Ave.
Towson, MD. 21204
301-296-4400

March 6, 1981

Kevin L. Byrd
2102 L. Street, N.W.
Washington, D.C. 20037

Re: *Catrett v. Johns-Manville Corporation, et al*

Dear Kevin

I note in reviewing our file that documents were to be produced in response to our request on October 28, 1980. As you recall no documents were produced on that date. Please inform by return mail when we can expect to receive the documents.



In addition I note that Judge Richey ordered that the Interrogatories on behalf of all the defendants be filed by February 13, 1981. The answers were to be filed within 20 days of their filing. By my calculations the answers were due on March 5, 1981. Please advise by return mail when we can expect to receive the answers.

Very truly yours,

/s/ Bruce
Bruce R. Parker

BRP:lac

June 10, 1981

Kevin B. Byrd, Esq.
Ashcraft & Gerel
2101 L Street, N.W.
Suite 303
Washington, D.C. 20037

Re: *Catrett v. Johns-Manville, et al.*

Dear Kevin:

In reviewing my file I note that documents were to be produced in response to our request on October 28, 1980. As of this date, no documents have been received or proffered. In addition, Judge Richey ordered that you file answers to the Interrogatories propounded by all defendants by March 5, 1981. I have given you several extensions since March 5 to answer the Interrogatories. I am no longer permitted to do so, and I must insist that

we be provided with at least an unexecuted set of answers by June 24, 1981. If answers are not received on that date, a motion to compel discovery for both the documents and Interrogatory answers will have to be filed.

Very truly yours,
Bruce R. Parker

BRP/bt
bcc: All Defense Counsel

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CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT,
Administratrix of the Estate
of Louis H. Catrett,

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
et al

Defendants

## MOTION OF DEFENDANT CELOTEX CORPORATION FOR SUMMARY JUDGMENT

(Filed September 28, 1981)

Defendant Celotex Corporation, by its counsel, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, hereby moves this Court for an Order granting summary judgment on the ground that plaintiff has failed to produce any evidence that any product designed, manufactured, or distributed by the Celotex Corporation was the proximate cause of the injuries alleged. There exists no genuine issue as to any material fact, and defendant the Celotex Corporation, therefore is entitled to judgment as a matter of law.

In support of this motion, the Celotex Corporation relies on the following:

1. The plaintiff's complaint and the answer of defendant the Celotex Corporation;

2. The attached Statement of Material Facts As To Which There is No Genuine Issue;

3. The record before the Court, including plaintiff's Answers to Interrogatories propounded jointly by all defendants; and

4. The Memorandum of Points and Authorities attached hereto.

Pursuant to Local Rule 1-9(f), the Celotex Corporation respectfully requests an oral hearing before the Court on this Motion.

Respectfully submitted,

William G. McMurtrie
8150 Leesburg Pike, Suite 503
Vienna, Virginia 22180
(703) 821-0821

*Counsel for The Celotex Corporation*

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CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT
Administratrix of the
Estate of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION, et al

Defendants

## STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Defendant Celotex Corporation hereby respectfully submits to the Court, pursuant to Local Rule 1-9(h), its statement of material facts as to which there is no genuine issue.[1]

1. On September 17, 1980, plaintiff Myrtle Nell Catrett, widow of Louis H. Catrett, as administratrix of his estate, brought suit in this Court alleging that his

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[1] This Statement of Material Facts is based upon the representations made and the facts alleged in plaintiff's Complaint and Answers to Defendants' Combined First Set of Interrogatories (hereinafter Answer to Intrerogatory No. —). Defendant Celotex Corporation relies upon said representations of plaintiff and her allegations of fact for purposes of this Motion only and for no other purpose. Accordingly, the material factual allegations stated herein are deemed admitted for the purpose of this Motion only and for no other purpose. *Cram v. Sun Insurance Office, Ltd.*, 375 F.2d 670, 673-74 (4th Cir. 1967). See also *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Legal conclusions are not deemed admitted for any purpose. See *United States v. Bimba*, 233 F. Supp. 966 (E.D.N.Y. 1964).

death on September 3, 1979, from lung cancer resulted from exposure to asbestos and asbestos products designed, manufactured, and distributed by fifteen companies including The Celotex Corporation. P. 6-10.

2. In response to Defendants' Combined First Set Of Interrogatories plaintiff failed to state any fact or produce any evidence to show that the decedent used or came into contact with any product containing asbestos designed, manufactured, or distributed by the Celotex Corporation.

3. Celotex Corporation, in its Second Set of Interrogatories to Plaintiff and Second Request for Production of Documents, asked plaintiff, *inter alia*, to describe all incidences of exposure of the decedent to products containing asbestos designed, manufactured, or distributed by defendant Celotex Corporation, and asked further for any evidence that any such product caused injury to or contributed to the death of the decedent.[2]

4. Plaintiff has not answered the Interrogatories of Celotex Corporation or produced any documents, and the time for doing so has now passed.

5. There is no evidence whatsoever that the decedent was ever exposed to any product containing asbestos de-

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[2] As a result of this Court's February 3, 1981 Order granting plaintiff's motion for a protective order, plaintiff was relieved of her obligation to respond to Celotex's first set of interrogatories and request for documents. Pursuant to that same Order plaintiff was to respond to defendants' joint interrogatories within 20 days of February 13, 1981. However, plaintiff did not submit her responses thereto until June 26, 1981. Thereafter, on June 30, 1981, defendant Celotex timely served its Second Set of Interrogatories and Second Request for Production of Documents pursuant to this Court's February 3, 1981 Order.



signed, manufactured, or distributed by Celotex Corporation, or that any such product was in any way the proximate cause of the decedent's death.

Respectfully submitted,

/s/ .....

William G. McMurtrie
8150 Leesburg Pike
Suite 503
Vienna, Virginia 22180
(703) 821-0821

*Counsel for Celotex Corporation*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT
Administratrix of the Estate
of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION, et al

Defendants

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANT CELOTEX CORPORATION FOR SUMMARY JUDGMENT

Defendant Celotex Corporation hereby moves for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure on the ground that plaintiff has failed to show the decedent came into contact with any product containing asbestos designed, manufactured, or distributed by Celotex. Celotex contends that, there is no genuine issue as to any material fact, and that Celotex, therefore, is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

## STATEMENT OF FACTS

This action was instituted by plaintiff as administratrix of the estate of Louis H. Catrett against fifteen defendants, including Celotex, each of which is alleged to have designed, manufactured, and distributed products containing asbestos. The Complaint claims that the death



of Mr. Catrett "was a direct and proximate result of the negligence of the defendants herein" (Complaint P. 6), "was a direct and proximate result of the breach of express warranties made by the defendants herein" (Complaint P. 7), "was a direct and proximate result of the breach of the implied warranty of fitness (and) the implied warranty of merchantability by the defendants herein" (Complaint P. 8, 9), and "was a direct and proximate result of the design, manufacture, and sale by the defendants herein of asbestos products which were defective and unreasonably dangerous to the user or consumer" (Complaint P. 10). Thus, the action of plaintiff sounds in negligence, breach of warranty, and strict liability.

The action is based upon the allegation that the decedent was employed as an asbestos insulation installer from 1957 to 1972, and "(d)uring that entire period of time, he sued (sic), installed, removed and frequently came into contact with asbestos and asbestos products designed, manufactured and distributed by the defendants." Complaint P. 5. It is claimed that that contact was the direct cause of Mr. Catrett's lung cancer and subsequent death.

All fifteen defendants propounded a set of interrogatories to plaintiff seeking, along with other information, who the decedent's employers were during the period in question, and what type brand of asbestos materials were used in each job. Defendants' Combined Interrogatory No. 51. Plaintiff failed to respond to the Interrogatory. Answer to Interrogatory No. 51.

Defendant Celotex subsequently propounded its own set of interrogatories to plaintiff, asking specifically, whether, in what circumstances, and in whose employ the

decedent came into contact with any asbestos materials designed, manufactured, or distributed by Celotex. Plaintiff has not responsed (sic) to those interrogatories, and the time within which she had to respond now has passed.

Up to this point in the litigation, almost a full year after the Complaint was filed, there has been no evidence that decedent ever came into contact with any product containing asbestos designed, manufactured, or distributed by Celotex.

## ARGUMENT

A motion for summary judgmnt (sic) is designed to determine whether there is a genuine material factual dispute for trial. ***Business Equipment Center, Ltd. v. DeJur-Amsco,*** 465 F. Supp. 775, 783, (D.D.C. 1978). See also *Donnelly v. Guion,* 467 F. 2d 290, 293 (2d Cir. 1972); *Bland v. Norfolk & Southern Ry. Co.,* 406 F. 2d 863, 866 (4th Cir. 1969). Thus, "the burden of proving that there is no genuine issue as to any material fact is on the moving party, but once the moving party has submitted a properly supported motion for summary judgment, Rule 56(e) requires the opposing party to produce at least some credible evidence beyond the pleadings in response." *Merit Motors, Inc. v. Chrysler Corp.,* 187 U.S. App. D.C. 11, 13, 569 F.2d 666, 668 (D.C. Cir. 1977). It is therefore incumbent upon the opponent of a motion for summary judgment to disclose "credible evidence for its position," and "summary judgemnt (sic) cannot be defeated by the vague hope that something may turn up at trial." *E.P. Hinkel & Co. v. Manhattan Co.,* 165 U.S. Ap. D.C. 140, 144, 506 F.2d 201, 205 (D.C. Cir. 1974). The applicable test for



assessing the instant motion is whether, when "viewed in the light most favorable to the party opposing the motion, "there remains a genuine issue of material fact for trial, or whether the case can be decided as a matter of law. *National Ass'n of Gov't Employees v. Campbell,* 192 U.S. App. D.C. 369, 373, 593, F. 2d 1023, 1027 (D.C. Cir. 1978).

An essential element of plaintiff's case against Celotex and each count therein is proximate cause. She must demonstrate some link between the Celotex product claimed to be the cause of the decedent's illness and the decedent himself. It is hornbook law that "there (must) be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." W. Prosser, Law of Torts 236 (4th ed. 1971). *Accord, Hicks v. United States,* 167 U.S. App. D.C. 169, 511 F.2d 407 (1975); *Dunn v. Marsh,* 129 U.S. App. D.C. 245, 393 F.2d 354 (1968); *Richardson v. Gregory,* 108 U.S. App. D.C. 263, 281 F.2d 626 (1960).

Assuming, *arguendo,* that plaintiff can demonstrate some hazard in the products designed, manufactured, or distributed by Celotex under either a negligence theory, a warranty theory, or a strict liability theory, she cannot recover damages resulting from her husband's death from Celotex unless she can prove, at the least, that he was exposed to those products. Celotex cannot be held liable for the death of Mr. Catrett in the absence of any evidence that its products had a direct impact on his health. The record is devoid of any such evidence. Plaintiff could not produce any proof that the decedent used any asbestos products designed, manufactured, or distributed by Celo-

tex in her answer to the Combined Interrogatories of the defendants, and she did not even respond to the specific inquiries propounded by Celotex on this subject. Plaintiff's failure to demonstrate that Celotex products were a proximate cause of the decedent's death defeats her cause of action as to this defendant, and Celotex, therefore, is entitled to summary judgment as a matter of law.

## CONCLUSION

Plaintiff has failed to support an essential element of her cause of action against defendant Celotex. Because she does not show any proximate cause between products designed, manufactured, or distributed by Celotex and the decedent's death, she cannot recover from Celotex for any injuries sustained as a result of his death. Consequently, as a matter of law, for the reasons stated herein, defendant Celotex is entitled to judgment. The Complaint against Celotex should be dismissed with prejudice.

Respectfully submitted,

/s/ .....

William G. McMurtrie
8150 Leesburg Pike
Suite 503
Vienna, Virginia 22180
(703) 821-0821

*Counsel for The Celotex Corporation*

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CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT,
Administratrix of the Estate
of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
et al

Defendants

## ORDER

Upon consideration of defendant Celotex Corporation's Motion for Summary Judgment, plaintiff's opposition thereto, the record herein, and the oral arguments of the parties, and the Court finding that there exists no genuine issue as to any material fact and that defendant Celotex Corporation is entitled to judgment as a matter of law, it is by this Court this — day of ———, 1981, hereby

ORDERED that the Motion of defendant Celotex Corporation for Summary Judgment should be, and it hereby is, GRANTED; and it is further

ORDERED that the Complaint be, and it hereby is, DISMISSED as to defendant Celotex Corporation, with prejudice.

/s/ ————————————
UNITED STATES DISTRICT JUDGE

DATED: ————————————, 1981

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

C. A. NO. 80-2232

MYRTLE NELL CATRETT, Administratrix
of the Estate of LOUIS H. CATRETT,
Deceased
2217 Naylor Road
Washington, D.C. 20020

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
et al

Defendants

THE CELOTEX CORPORATION
RESPONSES TO INTERROGATORIES

(Filed October 2, 1981)

COMES NOW the defendant, The Celotex Corporation, by and through its counsel, and upon information supplied to it by its local representatives, and for answers to Interrogatories propounded to it by the plaintiff states as follows:

The Celotex Corporation (hereinafter Celotex) is a successor-in-business to various companies and corporations which were engaged in the manufacture and sale of asbestos containing insulation products. Celotex's involvement in the asbestos insulation business began with its purchase of Panacon Corp. in 1972. Prior to that date, Celotex did not have any interest whatsoever in the asbestos insulation field.



Most all of the events which may be relevant to the issues presented in this and related cases, occurred prior to Celotex's purchase of Panacon Corporation. For this reason and the fact that many of the matters inquired about took place several decades ago, information furnished in this response may be vague and inaccurate. Nevertheless, Celotex has endeavored to fully investigate all relevant happenings and circumstances and the following responses are based upon its investigation. However, Celotex cannot exclude the possibility that its continued investigation may reveal more complete information, or even information which contradicts the responses herein. Furthermore, a considerable amount of the information supplied in the following responses was obtained from employees of predecessor corporations. Accordingly, Celotex cannot admit these matters, nor can it attest to the accuracy or truthfulness of responses from individuals who are not (and who have never been) employed by this Defendant. Information of this nature is being supplied because it may lead to the discovery of admissible evidence.

1. State the name, address, and job title of each person who has supplied information used in answering these Interrogatories.

*Answer.* The responses to these interrogatories are prepared by the legal department of the parent corporation of the Celotex Corporation. They are signed by D. S. Gibson, Manager of Safety and Property Conservation as authorized officer of the corporation, and not on the basis of his personal knowledge of the facts stated herein.

2. State whether or not you are a corporation; if so, state your correct corporate name, the state of your

incorporation, the address of your principal place of business, and whether or not you have ever held a Certificate of Authority to do business in the District of Columbia.

*Answer.* The Defendant is a corporation whose correct corporate name is The Celotex Corporation, whose state of incorporation is Delaware, and whose principal place of business is at 1500 North Dale Mabry Highway, Tampa, Florida 33607. The Defendant has held a Certificate of Authority to do business in the District of Columbia.

3. Has Defendant or any of its subsidiary companies at any time engaged in mining and subsequent sale of material containing asbestos fibers?

*Answer.* Carey Canada, Inc. (formerly known as Carey-Canadian Mines, Ltd) was incorporated in the dominion of Canada on February 14, 1972, and is presently an independent wholly owned subsidiary of the Celotex Corporation. Carey Canada Inc., is engaged in the mining and milling of raw chrysotile asbestos fibers. All sales of the raw asbestos fibers take place in Canada.

4. Has Defendant or any of its subsidiary companies at any time engaged in the manufacture and sale of products containing asbestos fibers?

*Answer.* The Celotex Corporation has been in the business of manufacturing, selling and distributing high-temperature industrial insulation products only since 1972. Its predecessors-in-business manufactured, sold, and distributed such products from 1906 until 1972.

5. Has Defendant or any of its subsidiary companies at any time engaged in the marketing and sale of products containing asbestos fibers?



*Answer.* Yes.

6. If the answer to one or more of the last three questions is affirmative, state, as to each affirmative answer, the following:

(a) The names of the companies mining, manufacturing, marketing, and/or selling each of those products.

(b) The trade or brand name of each of those products named, manufactured, marketed, and/or sold.

(c) The date each of the named products was placed on the market.

(d) The date each of the named products was withdrawn from the market.

(e) A description of the physical (chemical) composition of each of the named products, including the type of asbestos contained in the product.

(f) A description of the physical appearance of each of the named products.

(g) A detailed description of the intended uses of each of the named products.

*Answer.* Other than the companies previously mentioned, the predecessors of Celotex had various names. Please refer to Corporate History Chart marked Exhibit "A" for this information.

(b - g) Please refer to Exhibit "B" for the desired information.

7. Does Defendant or any of its subsidiary companies claim that any patent would cover any product listed in Interrogatory No. 6?

*Answer.* Yes.

8. If the answer to Interrogatory No. 7 is affirmative, for each of the products please state:

(a) The number of each patent and the date it was issued; or

(b) The number of each patent application that is pending and the date it was filed.

*Answer.* (a-b) The following list represents those patents currently held by the Celotex Corporation.

ASBESTOS FIBER
PIPE INSULATION PATENTS

| PATENT NUMBER | DATE |
|---|---|
| 1931795 | 10-24-33 |
| 1974519 | 9-25-34 |
| 2042096 | 5-26-36 |
| 2262953 | 11-18-41 |
| 2225032 | 3-03-42 |
| 2284439 | 5-26-42 |
| 2288170 | 6-20-42 |
| 2348829 | 5-16-44 |
| 2348898 | 5-16-44 |
| 2884380 | 4-28-59 |
| 2971878 | 2-14-61 |
| 3367871 | 2-10-68 |
| 3408316 | 10-29-68 |
| 3639276 | 2-01-72 |

9. Have any of the products listed in Interrogatory No. 6 been altered in chemical composition since first being marketed?



*Answer.* Predecessors-in-business began manufacturing Careytemp as an asbestos-free high temperature insulation product in 1969. This product line was developed because reinforcement with glass fiber made the product less susceptible to breakage. Also, this change was made as a result of the awareness of the controversy that existed concerning the health hazards associated with the use of asbestos-containing products.

10. If the answer to Interrogatory No. 9 is affirmative, please state:

(a) The trade name of each of those products.

(b) The date each of the named products was altered.

(c) The nature of the alteration.

(d) The reason for the alteration.

*Answer.* See Response to No. 9 above.

11. State the name, address, and job title of each person who participated in the design and preparation of manufacturing specifications for each product listed in Interrogatory No. 6.

*Answer.* Mr. Arthur P. Mueller, The Celotex Corporation, Industrial Products Division, 320 South Wayne Avenue, Lockland, Ohio 45215.

12. Do any documents, including written memoranda, specifications, recommendations, blueprints, or other written materials of any kind or character relating to the design and preparation of the products listed in Interrogatory No. 6 now exist?

*Answer.* No.

13. If the answer to Interrogatory No. 21 is affirmative:

(a) List each document.

(b) State the name, address, and job title of each person who currently has possession of each document, and where the documents are presently located.

*Answer.* See Response to No. 12 above.

14. Before releasing the products listed in Interrogatory No. 6 to the public, were any tests conducted on them to determine potential health hazards involved in the use of materials contained in those products?

*Answer.* When Defendant released these products to the public, Defendant was unaware that they presented any potential health hazards to those using them. Any tests performed on these products before their release, therefore, were primarily devoted to product development and control. In subsequent years, however, additional tests were performed on these products.

As to research relating specifically to predecessor's product, a study was conducted March 10, 1961, at the Indianapolis Power & Light Company, Harding Street Plant, Indianapolis, Indiana, by John Kehoe, Chemical Engineer, Indiana State Board of Health, 1330 W. Michigan Street, Indianapolis, Indiana. Attached and marked Exhibit "C" is a letter from Albert Edwards, Industiral (sic) Hygiene Engineer, to F. P. Ray, Indianapolis Contract Manager, of the Philip Carey Manufacturing Company. This letter is dated April 13, 1961, and reached the following conclusion:

> "Under present operating conditions, it is concluded that no serious dust exposures are associated with the installation of Careytemp insulation."



In addition, a test was conducted at the Union Carbide Plant in Institute, West Virginia in 1967. Celotex has a document, attached and marked Exhibit "D", dated January 2, 1968, addressed to Art Mueller and authored by J. Pierce, Assistant Professor of Environmental Health at the Kettering Laboratory in Cincinnati, Ohio. The document reports and analyzes samples of air taken during fabrication of Careytemp insulation at the Union Carbide plant in Charleston, West Virginia. Dust counts taken at the sawing and fabrication operation indicated dust levels far below the threshold limit value for nuisance dust as established by the ACGIH. Because of the low asbestos content of Careytemp, x-ray defraction tests failed to pick up any airborne asbestos fibers. However, the study recognized that trace amounts (less than 5%) of crystalline silica and asbestos fiber are not often detectable using x-ray defraction techniques. Nevertheless, it was felt that the amount of airborne asbestos fiber, if any, was certainly below the accepted threshold limit value for asbestos fiber. Mr. J. Pierce reported his objective findings, but did not state any conclusions after conducting the dust count.

15. If the answer to Interrogatory No. 14 is affirmative, state:

(a) the names of the products tested.

(b) The name, address, and job title of each person who conducted those tests.

(c) The results of those tests.

*Answer.* See response to No. 14 above.

16. Do any documents, including written memoranda, specifications, recommendations, blueprints, or other writ-

ten materials of any kind or character relating to the testing of the named products now exist?

*Answer.* Not applicable.

17. If the answer to Interrogatory No. 16 is affirmative:

(a) List each document.

(b) State the name, address, and job title of each person who currently has possession of each document, and where it is presently located.

*Answer.* Not applicable.

18. Did Defendant or any of its subsidiary companies make any design changes as a result of those tests?

*Answer.* Not applicable.

19. If the answer to Interrogatory No. 18 is affirmative, state:

(a) The trade names of the products changed.

(b) The nature of the changes made.

(c) The name, address, and job title of each person responsible for having made a change.

*Answer.* Not applicable.

20. After releasing the products listed in Interrogatory No. 6 to the public, were any tests conducted on them to determine potential health hazards involved in the use of materials contained in those products?

*Answer.* See Response to No. 14 above.

21. If the answer to Interrogatory No. 20 is affirmative, state:



(a) The names of the products tested.

(b) The name, address, and job title of each person who conducted those tests.

(c) The results of those tests.

*Answer.* See Response to No. 20 above.

22. Do any documents, including written memoranda, specifications, recommendations, blueprints, or other written materials of any kind or character relating to the potential health hazards of the products listed in Interrogatory No. 6 now exist?

*Answer.* Please refer to Exhibits "C" and "D".

23. If the answer to Interrogatory No. 22 is affirmative:

(a) Name each product.

(b) List each document.

(c) State the name, address, and job title of each person who currently has possession of each document, and where it is presently located.

*Answer.* See Response to No. 22 above.

24. Did Defendant or any of its subsidiary companies make any design changes as a result of those tests?

*Answer.* The tests as outlined above indicated that Careytemp was a safe product which proposed no substantial health hazards to those using it. There were two major reasons for the design change of Careytemp. The main reason was that the old product was subject to continual breakage, whereas the new product remedied this situation. The other reason was based upon our predecessors'-in-

interest awareness of the controversy of the potential health hazard of asbestos products. For these reasons, it was decided that a design change in the Careytemp product was warranted.

25. If the answer to Interrogatory No. 24 is affirmative, state:

(a) The names of the products changed.

(b) The name, address, and job title of each person responsible for having made a change.

*Answer.* See response to No. 24 above.

26. Has Defendant or any of its subsidiary companies, at any time, published or distributed any printed material, including brochures, pamphlets, or other written materials of any kind or character, that contained any warnings concerning the possibility of injury resulting from the use of the products listed in Interrogatory No. 6?

*Answer.* Defendant's high temperature industrial insulation products were shipped in bags, boxes, crates and gallon drums. Apolication (sic) instructions were printed on predecessors' bags of MW-1 and MW-50 cement. Celotex is continuing its efforts to locate and review records of its predecessors-in-business, but cannot at this time state what other instructions, if any, were given by predecessors-in-business.

Warning labels were placed on Celotex's products containing asbestos. Research indicates that warning labels first appeared on such products in 1972. Because of record retention policies, we do not have complete records of our predecessors-in-business. The warning label had the following information printed in bold, black letters on a white background:



CAUTION
CONTAINS ASBESTOS FIBERS
AVOID CREATING DUST
BREATHING ASBESTOS DUST MAY CAUSE
SERIOUS BODILY HARM

The above warning was revised and the following warning was used by The Celotex Corporation from 1976 to early 1979. This warning also appeared in the sales literature brochures of Celotex:

WARNING
THIS PRODUCT IS (ASBESTOS FIBER)
OR (CONTAINS ASBESTOS FIBER).
THE OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION (OSHA), AN AGENCY OF
THE UNITED STATES GOVERNMENT
BELIEVES THAT REPEATED INHALATION
OF ASBESTOS FIBERS IS A HEALTH
HAZARD AND MAY CAUSE VARIOUS
DISEASES INCLUDING CANCER
AND ASBESTOSIS.

These warnings appeared on printed labels approximately 3 x 4 inches in size. In July, 1979, Celotex again revised the warning label to read as follows:

CAUTION
CONTAINS ASBESTOS FIBERS
AVOID CREATING DUST
BREATHING ASBESTOS DUST MAY CAUSE
SERIOUS BODILY HARM. INCLUDING
CANCER AND ASBESTOSIS
IF DUST IS CREATED, PERSONS EXPOSED
TO THIS MATERIAL SHOULD USE
ADEQUATE PROTECTIVE DEVICES.
SMOKING GREATLY INCREASES THE
RISK OF SERIOUS BODILY HARM.

27. If the answer to Interrogatory No. 26 is affirmative, state:

(a) The names of the relevant products.

(b) The wording of each warning.

(c) A description of each printed material.

(d) The method used to distribute the warning to persons likely to use the product.

(e) The date each warning was issued.

(f) The name, address, and job title of each person responsible for having issued the warning, and the current location of any remaining literature.

*Answer.* See response to No. 26 above.

28. Have you received notice that any other person is claiming or has claimed an injury as a result of using asbestos products manufactured and/or sold by your company or any of your subsidiary companies (either before or after the filing of this action)?

*Answer.* Defendant objects generally to this question as overbroad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Defendant will acknowledge that it has been a named defendant in numerous lawsuits similar to the one brought by Plaintiff.

29. If the answer to Interrogatory No. 28 is affirmative, state:

(a) The name and address of each claimant.

(b) The date of notice of each claim.



(c) A description of the claim.

(d) The type of injuries allegedly sustained.

(e) The name and address of each attorney who represents each individual making a claim.

(f) The style and court number of each claim currently pending.

(g) The resolution of each claim that has been settled or taken to judgment.

*Answer.* See Response to No. 28 above.

30. Do you or any of your subsidiary companeis (sic) have any records indicating that any of the products listed in Interrogatory No. 6 were sold to any of the companies listed on the attached Exhibit "A"?

*Answer.* Celotex and predecessors-in-business are/were engaged in highly diversified businesses. Asbestos-containing insulation sales constituted a minimum of the business of predecessors-in-business. Such sales are only a minute portion of Celotex's business. Accordingly, available invoice records reflecting general sales are predominantly comprised of non-asbestos products. Records of asbestos insulation sales have not been segregated from the general sales invoices; therefore, locating records of insulation sales involves a manual search of each invoice in order to determine if the sale consisted of any asbestos product.

Invoice records since June, 1972 are located in Tampa, Florida. These records are stored in a computer and can only be retrieved by searching each customer at a particular address on a monthly basis. See the attached affi-

davit of Stanley Peters, marked Exhibit "E", for a further explanation of the difficulty in computer record search for invoices on asbestos-containing insulation products.

Celotex has a limited number of invoices of predecessors-in-business dating back to 1967. These invoice records are not segregated into asbestos products and non-asbestos products, and therefore the same search problem is encountered with these invoice records. Also, a large percentage of these records are not indexed according to purchaser, rather, they are indexed according to the plant where the product was manufactured and the date of manufacture. The plants manufactured many other products which did not contain asbestos. These records are stored at defendant's plant in Lockland, Ohio. See the attached affidavit of Ken Brown, marked Exhibit "F", for a further explanation of the difficulty in searching required to find particular records.

31. If the answer to Interrogatory No. 30 is affirmative, state:

(a) The name, address, and job title of each individual who currently has possession of those records and their present location.

(b) The name of each company listed on Exhibit "A" to whom those products have been sold.

(c) The date of each sale and the amount and kind of materials sold.

*Answer.* See response to No. 30 above.

32. Are your asbestos products marketed and sold by companies other than your own?



*Answer.* Calcium silicate pipe and block insulation is believed to have been purchased by the Philip Carey Manufacturing Company from Baldwin-Ehret-Hill (or its successor Keene Corp.) for one or two years in the early 1960's. Also during this time frame, predecessors may have purchased a small amount of this product from PABCO (now Fibreboard). Calcium silicate insulation purchased by predecessors' contract units is believed to have been sold or used "as is". In addition to purchases through predecessors' contract units, a small quantity of calcium silicate pipe and block insulation was purchased and relabeled "Carey Calcium Silicate". In 1967, defendant's predecessor stopped manufacturing MW-50 cement; however, defendant continued to broker this product after purchasing it from Keene Corp., Forty-Eight Insulations, Santaler Bros., and the successor to Eagle-Picher. The product bokered (sic) until about 1977. It is now known if defendant or precedessors-in-business relabeled MW-50 prior to resale.

A small quantity of Careytemp was purchased by Eagle-Picher, which Celotex believes was relabeled under the name "Hy-Lo". Also, some Careytemp may have been purchased by Armstrong Cork for an unknown period of time.

33. If the answer to Interrogatory No. 32 is affirmative, list the names and addresses of each of those companies.

*Answer.* See response to No. 32 above.

34. List each individual who has acted in a medical advisory capacity to your company in the past 25 years, including, but not limited to, physicians and industrial hy-

gienists, and the current address and job title of each of those individuals.

*Answer.* Neither Celotex nor its predecessors-in-business had a person employed as a medical officer or director. For a period of one year in 1963, a predecessor-in-business retained Dr. Thomas Mancuso as a Medical Consultant, to review the Occupational Health Program at the Lockland, Ohio, plant. Dr. Mancuso is employed at the University of Pittsburgh, Pittsburgh, Pennsylvania.

Due to record retention policies, defendant does not have complete records of its predecessors-in-business; however, defendant is aware that the following physicians were at some time employed or retained by predecessors-in-business. Those doctors were:

Dr. Virgil A. Plessinger; 2700 Central Trust Tower, Cincinnati, OH

Dr. Ruehlman; 83 South Eagle Road; Hebrewtown, PA

Dr. Robert G. Loudon; address unknown

Lee B. Fosdick, address unknown, was hired by Celotex's predecessors-in-business in December 1962, to perform an industrial hygiene survey of dust levels at the Lockland, Ohio plant. The following industrial hygienists were employed to take dust level counts:

B.I. Stallings, address unknown; 1967, 1972.

Edward B. Engle, address unknown; May, 1968.

Professor D.W. Yeager, Institute of Environmental Health, Kettering Laboratories, University of Cincinnati, Cincinnati, Ohio; August 1974 and April, 1978.

Fred T. Lyon, address unknown; February, 1976 and April, 1976.



Michael B. Amster, address unknown; April 1, 1978 and July, 1977.

Robert L. Sweeney, address unknown; October, 1974 and June, 1973.

E.B. Engel, address unknown; March, 1971.

D.B. Troup, address unknown; July, 1973.

S.R. Wheeler, address unknown; Linden, New Jersey plant, date unknown.

35. Does Defendant have in its possession any books, pamphlets, memoranda, or written materials of any kind or character that would indicate that asbestos fibers, when inhaled, can be hazardous to the health of human beings?

*Answer.* Defendant presumes this reference is to the article by Dr. Selikoff, et al, which was published in the Annals of the New York Academy of Sciences on December 31, 1965. This article was the first epidemiological study which informed the medical, scientific, and manufacturing communities of a possible health hazard to insulation applicators, whose exposure to asbestos was vastly different than manufacturing communities of a possible health hazard to insulation applicators, whose exposure to asbestos was vastly different than manufacturing employees working with 100% raw asbestos fiber.

The Fleischer-Drinker Article was published in 1946. This epidemiological study was entitled "A Health Survey of Pipe Covering Operations in Constructing Naval Vessels." One of the conclusions reached in this article was that " . . . such pipe covering is not a dnagerous (sic) occupation."

This defendant objects to attaching copies of all documents requested herein, on the grounds that this request is overly broad and unduly burdensome.

The Legal Department of the parent corporation of Celotex has recently gathered a number of medical articles to assist it in the defense of asbestos related litigation. These articles are located in the Legal Department of Defendant's corporate headquarters in Tampa, Florida.

36. If the answer to Interrogatory No. 35 is affirmative, state:

(a) The name of each publication.

(b) The date of publication and the names of the author and publisher.

(c) The name, job title, and address of each person who currently has possession of each publication and its present location.

*Answer.* See Response to No. 35 above.

37. Has Defendant undertaken to investigate the occurrences alleged an Plaintiff's complaint?

*Answer.* As any investigation undertaken in this action was performed by Defendant's local counsel, any information obtained therefrom would be privileged.

38. If the answer to Interrogatory No. 37 is affirmative:

(a) State the name, address, and job title of the persons participating in each investigation.

(b) List each written record pertaining to each investigation and its location and custodian.

(c) Has Defendant obtained statements from any witnesses?



(d) If the answer to (c) is affirmative, list the name and address of each witness who has made a statement, and the name, address, and job title of each person currently having custody of each statement and its present location.

*Answer.* See Response to No. 37 above.

39. Does Defendant admit that service of process was properly made on Defendant in this case?

*Answer.* Refer to pleadings previously filed in this action.

40. If the answer to Interrogatory No. 39 is negative, explain the reason for that answer.

*Answer.* See response to No. 39 above.

41. Has Defendant or any of its subsidiary companies at any time been members of any "trade organization" or "association" comprised of other manufacturers, miners, marketers, and/or sellers of asbestos products?

*Answer.* The Celotex Corporation and its predecessors-in-business have been, or presently are, members of the following organizations:

Asbestos Information Association of North America since 1968 or 69.

Thermal Insulation Manufacturers Association since 1978.

Asbestos Cement Products Association, up until 1965.

National Mineral Wool Association, 1960-65.

Magnesia Insulation Manufacturers Association prior to 1950's.

National Insulation Contractors' Association since about 1975.

42. If the answer to Interrogatory No. 41 is affirmative, state:

(a) The name and address of each of those associations or organizations.

(b) The dates during which Defendant or any of its subsidiary companies were members.

(c) The names of any publications published by or written by any of the named associations or organizations.

*Answer.* See Response to No. 41 above.

43. Identify by name and location each plant in which the products listed in your answer to Interrogatory No. 6 were manufactured and/or assembled; specify which plants produced each item; and state the dates each plant has been in operation, and the time span during which each named item was produced.

*Answer.* The Celotex Corporation and its predecessors-in-business have operated manufacturing facilities, which produced asbestos-containing insulation materials, at the following locations:

Lockland, Ohio—1906 through present. (high and low temperature insulation products);

Plymouth Meeting, Pennsylvania—1906 through 1962. (high temperature insulation products only);

Linden, New Jersey—unknown through present. (asbestos papers and felts). Defendant took over in 1969.



44. List the name and address of each business entity from whom you have received raw asbestos, the dates it was received, and amounts received.

*Answer.* Raw asbestos fibers are believed to have been purchased from the following sources:

Vermont Asbestos (G.A.F.)
Asbestos Corporation, Ltd.
Calvaros Asbestos
Johns-Manville

Quebec Asbestos Corp., Ltd.
Johnson Asbestos
North American Asbestos
Carey-Canadian Mines, Ltd.

45. Have sales materials been prepared by Defendant or any of its subsidiary companies or their agents for purposes of marketing or advertising asbestos products?

*Answer.* Sales literature brochures have been prepared by the marketing department of Celotex and similar departments of its predecessors in business. These brochures were mailed to various distributors and contractors. Celotex will make available for inspection all product literature brochures in its possession for the years 1930 through the present. Brochures do not exist for each year inclusively.

46. If the answer to Interrogatory No. 45 is affirmative, state:

(a) The name, address, and job title of each person or entity who prepared it.

(b) The name, address, and job title of each person who currently has possession of it and its present location.

(c) The date the materials were prepared.

(d) The media used to disseminate the sales materials.

*Answer.* See response to No. 45 above.

47. Have any written materials of any kind or character been prepared by Defendant or any of its subsidiary companies or their agents indicating how asbestos products should be used and maintained?

*Answer.* See response to No. 26 above.

48. If the answer to Interrogatory No. 48 is affirmative, state:

(a) The name, address, and job title of each person who prepared it.

(b) The name, address, and job title of each person who currently has possession of it and its present location.

(c) The dates of distribution, and manner in which the materials were distributed to purchasers of Defendants' products.

*Answer.* See response to No. 47 above.

49. Does Defendant contend that plaintiff improperly used its products?

*Answer.* This information is presently unknown, as discovery is still continuing in this case, but discovery in other, similar cases has indicated that misuse of asbestos containing products was common among insulation workers in the Washington, D.C. area.

50. If the answer to Interrogatory No. 49 is affirmative, set out in detail in what respect those products were improperly used.



*Answer.* See response to No. 49 above.

51. Does Defendant have insurance policies that might cover the claims made by Plaintiff in this case?

*Answer.* Refer to attached List of General Liability Insurance Carriers marked Exhibit "G".

52. If the answer to Interrogatory No. 51 is affirmative. list the name of each insurance carrier, the amount of coverage, and the effective dates of each policy.

*Answer.* See response to No. 51 above.

53. Does Defendant expect to call expert witnesses at the trial of this case?

*Answer.* Unknown at this time.

54. If the answer to Interrogatory No. 53 is affirmative, state:

(a) The name, address, and job title of each expert witness.

(b) The testimony expected to be given by each expert witness.

*Answer.* See response to No. 53 above.

55. On what date did Defendant first become aware that inaalation (sic) of asbestos fibers by human beings could cause adverse health consequences?

*Answer.* Celotex now recognizes that prolonged inhalation of high concentrations of asbestos fibers may pose a potential health hazard. Defendant believes that its predecessors became aware of this possibility in the mid-1960's shortly before our predecessor's Careytemp product became asbestos-free. An article by Irving Seli-

koff, M.D., et al, published in the Annals of the New York Academy of Sciences on December 21, 1965, was the first epidemiological study which informed the medical, scientific and manufacturing communities of a possible health hazard to insulation applicators.

56. Does Defendant contend that asbestos products can be manufactured so as to eliminate all potential health hazards to workers working with them?

*Answer.* Defendant objects to this interrogatory on the grounds that the phrase "so as to eliminate all potential health hazards" is vague and ambiguous. Also, any answer to this question would be meaningless, inasmuch as a manufacturer is not a guarantor, and cannot be held to such a standard of eliminating "all" potential health hazards. For example, a glass bottle manufacturer could not eliminate the possibility that someone might accidentally drop an otherwise safe bottle and cut themselves. Defendant submits that many reasonable people believe that "anything is possible!". Without waiving any of the aforesaid objections, Defendant states that it believes currently manufactured asbestos products (such as asbestos paper, asbestos roofing felt, asphalt saturated asbestos roofing cement, etc.) do not present any substantial health hazard to workers applying or otherwise using the products in a reasonable fashion.

57. If the answer to Interrogatory No. 56 is affirmative, please explain.

*Answer.* See response to No. 56 above.

58. Describe in detail the types of packages in which Defendant, or any of its subsidiary companies, sold asbestos material, listing the dates of each type of package, a physical description of each type of package, and a description of any printed material or trademarks that appeared on it.



*Answer.* Defendant's high temperature industrial insulation products were shipped in bags, boxes, crates and gallon drums. Application instructions were printed on predecessors' bags of MW-1 and MW-50 cement. Celotex is continuing its efforts to locate and review records of its predecessors-in-business, but cannot at this time state what other instructions, if any, were given by predecessors-in-business.

59. Had defendant or any of its subsidiary companies, at any time entered into a "rebranding" agreement with any other company, either as a buyer or a seller, concerning asbestos insulation materials?

*Answer.* See response to No. 32 above.

60. If your answer to Interrogatory No. 59 is affirmative, state, as to each of those agreements:

(a) The name of the company manufacturing the asbestos products under the agreement;

(b) The trade name affixed to those products;

(c) The periods of time covered by the agreement;

(d) The volume (in dollar amount) of the transaction;

(e) The purchaser of the products.

*Answer.* No.

61. (sic)

62. If the answer to Interrogatory No. 61 is affirmative, state:

(a) The name, address, and job title of each person having custody of each of those documents and its current location.

(b) A brief description of each document.

*Answer.* Not applicable.

63. Has any person, before 1964, filed a claim against a Workers' Compensation carrier covering Defendant or any of its subsidiaries, alleging that he or she has contracted a disease from inhaling asbestos materials?

*Answer.* Yes.

64. If the answer to Interrogatory No. 63 is affirmative, state:

(a) A list of the claims, including each claimant's name, address, and date each claim was filed, and the jurisdiction of the claim.

(b) A brief summary of the disposition of each claim.

*Answer.* Celotex objects to furnishing a response relating to compensation claims filed by employees at defendant and/or predecessors' manufacturing plants. Plant employees worked with and were continually exposed to 100% raw asbestos fiber in an enclosed plant environment. Insualtion (sic) applicators, however, were exposed to a manufactured product containing a much smaller percentage of asbestos, and such asbestos fiber was encapsulated in the products manufactured. Without waiving this objection, Celotex sets forth below a list of unverified claims of former employees who worked outside of the manufacturing plants and whose exposure to asbestos may have been similar to the exposure of the plaintiff.



## WORKMEN'S COMPENSATION CLAIMS

The Celotex Corporation, successor-in-business to the Philip Carey Manufacturing Company, believes that the following individuals may have filed a workmen's compensation claim for an illness associated with exposure to asbestos dust. Much of the following information was recently discovered in connection with current asbestos litigation. Accordingly, the Celotex Corporation is unable to verify if, or when, Philip Carey became aware of the claims listed below. Many of the claims do not list Philip Carey as a defendant and it is believed that Philip Carey's only connection with the claim is the fact that the claimant may have worked for one of Philip Carey's contract units, sometime prior to filing the claim.

The Celotex Corporation has searched its records for additional information and/or verification of these claims. All material information that has been obtained is listed below. It must be emphasized that Celotex is not admitting or verifying the authenticity of any claim listed below. Further, the information is being supplied because it may lead to the discovery of relevant and admissible evidence. The information below does not include any workmen's compensation claims filed by employees working in any manufacturing facility:

| EMPLOYEE NAME | DATE FILED | STATE FILED | DISPOSITION | LAST KNOWN ADDRESS |
|---|---|---|---|---|
| Harold Swinson | 4-18-61 | RI | Unknown | 153 Garden City Dr. Cranston, RI |
| John Swartout | 12-30-55 | CA | Awarded benefits | 3000 Merry Wood Dr. Sacramento, CA |

| | | | | |
|---|---|---|---|---|
| Allen Everitt | 1963 | CA | Unknown | 449 22nd St. Richmond, CA |
| Steve Gilivich | 11-30-61 | CA | Settled claim for respiratory prob. | 239 Georgia Ave San Bruno, CA |
| Clifford Harding | 1-09-55 | CA | Settled claim for abestosis | 1407 Howe Ave., Sacramento, CA |
| Anthony Onofrio | 1962 | CA | Unknown | Unknown |
| John Tyler | Unknown | CA | Settled claim for asbestosis | Unknown |
| Robert Horsman | Unknown | CA | Unknown | Unknown |
| Edward Pfleghar | Unknown | CA | Unknown | Unknown |
| Wayne Boyer | Unknown | NV | Unknown | Unknown |
| Henry C. Pusti | Unknown | CA | Unknown | Unknown |
| Clyde Nicholson | Unknown | CA | Unknown | Unknown |
| Wm. H. McCormick | Unknown | CA | Unknown | Unknown |
| William R. Crader | 6-10-66 | CA | Allowed | 10603 Valencia Bloomington, CA |
| Wm. E. Latto | 7-29-60 | OH | Allowed | 178 Laurie Dr. Ormond Beach, FL |

65. Does Defendant admit that it or any of its subsidiaries sold asbestosis (sic) insulation materials in the District of Columbia at any time?

*Answer.* See response to No. 30 above.

66. If your answer to Interrogatory No. 65 is affirmative, list the dates during which the product was sold, and the dollar volume of the sales for each year before 1975.



The Celotex Corporation
By Counsel

HADEN, RHATIGAN & MCMURTRIE, P.C.
8150 Leesburg Pike, Suite 503
Vienna, Virginia 22180
(703) 821-0821

By /s/ .....

William G. McMurtrie (#207720)
Attorney for The Celotex Corporation
(Certificate of Service omitted in printing)

The undersigned, D. S. Gibson, is Manager of Safety for the Industrial Products Division, and at the present, he has responsibility for plant safety. However, he has no personal knowledge of the facts set forth herein, since the present Celotex organization did not control the personnel and facilities involved at times relevant to this lawsuit, and further, such facts are the result of the investigation by attorneys on behalf of Celotex, and he affirms these Requests for Admissions for purposes of taking necessary official action by The Celotex Corporation only

THE CELOTEX CORPORATION
INDUSTRIAL PRODUCTS DIVISION
By /s/ D. S. Gibson
Its Manager of Safety
and Property Conservation

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me the undersigned, a Notary Public in and for the County aforesaid, this day appeared D. S. Gibson, who stated he is authorized to execute the foregoing Requests for Admissions and Genuineness of Documents on behalf of The Celotex Corporation and that the matters stated in said Answers are true and correct to the best of his knowledge, information and belief.

SUBSCRIBED AND SWORN TO BEFORE ME, this the 30th day of July 1981.

/s/ Sharon L. Tomlinson
Notary Public in and for
State of Florida
County of Hillsborough

Notary Public State of Florida at Large
My Commission Expires Feb. 15, 1985.

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EXHIBIT "A"

CORPORATE HISTORY
OF
THE PHILIP CAREY
MANUFACTURING COMPANY

The Philip Carey Manufacturing Company was organized in Ohio in 1888 and remained an independent company until 1966, when Glen Alden Corporation (a wholly-owned subsidiary of Rapid-American Corporation) acquired control. In 1968, The Philip Carey Manufacturing Company changed its name to Philip Carey Corporation.

In April, 1970, Philip Carey Corporation was statutorially merged into Briggs Manufacturing Company, A Michigan corporation, and simultaneously, Briggs changed its name to Panacon Corporation.

On June 30, 1972, Panacon Corporation was merged into The Celotex Corporation, a Delaware corporation (a wholly-owned subsidiary of Jim Walter Corporation, a Florida corporation). This merger was also statutory, and The Celotex Corporation assumed the assets and ordinary liabilities of Panacon Corporation.

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# EXHIBIT "B"

Asbestos Containing Products
Manufactured by Philip Carey and Celotex
Showing % of Asbestos Content

| Name, Trade Name and Description | Date of Manufacture | Contents |
|---|---|---|
| ( 1) Carey Aircel Pipe | 1906 to 1960 | Asbestos corrugated paper, approximately 60% asbestos fiber, 25% organic fiber and starch, 15% sodium silicate |
| ( 2) Careycel Pipe Covering & Block | 1920's to 1960 | Similar to Aircel |
| ( 3) Carocel Pipe Covering | 1925 to 1960 | Same as Aircel, thicker |
| ( 4) Defendex Pipe Covering | WW II | Corrugated sheets of asbestos paper, asbestos 60%, 25% organic felt, 15% sodium silicate |
| ( 5) Carey Excel Pipe Covering & Block | 1925 to 1960 | Same as Aircel |
| ( 6) Carey Glosscell Covering & Block | 1935 to 1960 | Aircel with shiney exterior |
| ( 7) Carey Lennolite | 1935 to 1969 not distributed in United States | Similar to Aircel |
| ( 8) Carey Multi-Ply Pipe Covering & Block | 1930 to 1960 | Same as Carey Asbestos Sponge |
| ( 9) Carey Asbestos Sponge Pipe Covering & Block | 1930 to 1960 | Asbestos sponge 2% to 3% corrugated asbestos paper, same as Aircel |
| (10) 85% Magnesia Pipe Covering, Block & Cement | 1906 to 1961 | Basic magnesium carbonate and asbestos fiber (11% to 15%) |



| Name, Trade Name and Description | Date of Manufacture | Contents |
|---|---|---|
| (11) Carey Super Light 85% Magnesia Pipe Covering & Block | 1951 to 1958 | Same as 85% magnesia (different mold-process) |
| (12) Carey Alltemp Pipe Covering & Block | 1954 to 1958 | Expanded perlite bentonite clay and asbestos fiber (12%) |
| (13) Carey Temp-check Pipe Covering, Block and Cement | 1942 to 1958 | 20% Magnesium Plastic, 60% diatomaceous earth and 25% asbestos |
| (14) Carey High-temp 19 Pipe Covering, Block and Cement | 1906 to 1958 | 80% Diatomaceous earth, 20% asbestos fiber |
| (15) Carey High-temp #15 Pipe Covering, Block, and Cement | 1906 to 1952 | 60% diatomaceous earth, 20% magnesia plastic, 20% asbestos |
| (16) Carey High-temp #12 Pipe Covering, Block and Cement | 1906 to 1940 | 60% diatomaceous earth, 20% magnesia, 20% asbestos fiber |
| (17) Careytemp | 1958 to September 1969 | Expanded perlite bentonite clay and asbestos fiber (6% to 7%) |
| (18) New Carey-temp 1500 Pipe Covering and Block | September 1969 to 1972, 1972 to present as Celotemp | Expanded perlite bentonite clay and chopped glass roving |
| (19) Careytemp adhesive | | Silicate of soda, additives and asbestos fiber |
| (20) Careytemp premolded Elbow Insulation | 1963 to present | Same as Careytemp |

| Name, Trade Name and Description | Date of Manufacture | Contents |
|---|---|---|
| (21) Careytemp Aluminum Jacketed and Traced Pipe Insulation | 1964 to 1968 | Careytemp with an aluminum jacket or stainless steel jacket |
| (22) Careytemp 2000 Block and Cement | 1964 to February 1970 | Diatomaceous earth and asbestos fiber, 6.4% |
| (23) Dual Careytemp Pipe Covering | 1964 to 1968 | Bentonite clay starch resin & asbestos fiber 19% |
| (24) Carey Calcium Silicate Pipe & & Block Insulation | 1950 to 1955 not manufactured by Philip Carey (believed manutured by Keene or Baldwin, Ehret & Hill) Brokered by Philip Carey | 85% Calcium Silicate 15% asbestos |
| (25) Carey 707 Cement | 1909 to 1960 | Asbestos fiber 70% bentonite clay |
| (26) Carey Super 606 Cement | 1906 to 1960 | Bentonite clay, asbestos fiber and gypsum |
| (27) Carey 100 Cement | Unknown | 60% asbestos fiber, bentonite clay and gypsum |
| (28) Carey 303 Cement | 1906 to 1960 | 60% Asbestos fiber, 20% gypsum, 20% bentonite clay |
| (29) Carey 7M-90 Asbestos Shorts Insulation Cement | 1906 to August 1977 | 90% asbestos fiber, 10% serpentine rock |
| (30) Carey M-W40 Cement | 1950 to 1952 | Mineral wool asbestos fiber, 10% and Portland cement 5% |
| (31) Carey M-W50 Cement | 1940 to 1967 (Continued to Broker Keene, M-W50 Cement) | Mineral wool, 10% asbestos fiber (asbestos removed from Keene M-W50 cement between 1972 to 1973.) |



| Name, Trade Name and Description | Date of Manufacture | Contents |
|---|---|---|
| (32) Carey LF-20 Asbestos Cement | Unknown to 1960 | 60% to 70% asbestos fiber, balance bentonite clay and hardeners |
| (33) Carey Vitricel Cement (#10 & #19) | 1940 to 1969 | Asbestos fiber and bonding material. |
| (34) Carey A-1 Cement | Unknown (supplied only to Gulf Oil) | 100% long asbestos fibers |
| (35) Carey A-101 Cement | 1906 to 1960 | Asbestos fiber, ground gypsum and bentonite clay |
| (36) Carey Thermo-bord | 1925 to 1969 | Non-asbestos insulation board covered with asbestos cement. |
| (37) 4.2 Carey Stone Corrugated Sheets | 1925 to 1970 | 3/8" corrugated sheet of Portland Cement & asbestos, (22%) |
| (38) Carey Industrial A-C Board | 1925 to 1970 | Portland Cement and asbestos fiber |
| (39) Careyflex Board | 1925 to 1969 | Portland Cement and asbestos fiber |
| (40) Carey Firefoil Board and Panel | 1940 to 1960 | Asbestos paper glued together with silicate (60% asbestos) |
| (41) Vitricel Asbestos Sheets | 1941 to 1950 | 60% asbestos fiber saturated with sodium silicate and water proofed. |
| (42) Carey Marine Panel | 1941 to 1950 | Aircel and asbestos cement (60% asbestos fiber) |
| (43) Carey Panel Board | 1941 to 1950 | Corrugated asbestos felt (60% asbestos fiber) |
| (44) Carey Stone Sheating | 1925 to 1969 | 22% Asbestos fiber & Portland Cement. |
| (45) Asbestos Paper and Roll Board | 1906 to present (currently marketed under Celotex name) | 60% asbestos fiber |

EXHIBIT "C"

STATE OF INDIANA

Address Reply to:

Indiana State Board of Health
1330 West Michigan Street
Indianapolis, Indiana

SEAL

State Board of Health
April 13, 1961

Mr. F. P. Ray
Indianapolis Contract Manager
Philip Carey Manufacturing Company
1432 Kentucky Avenue
Indianapolis, Indiana

Dear Mr. Ray:

At the request of Mr. R. J. Scott, Business Representative of Local 18 of the International Association of Heat and Frost Insulators and Asbestos Workers, a visit was made with you to the Indianapolis Power and Light Company's Harding Street plant by Mr. John Kehoe, Chemical Engineer, on March 10, 1961, to evaluate dust conditions associated with the installation of Careytemp insulation. The employees installing this insulation had experienced irritation to the eyes, nose and throat and were concerned about the potential health hazards associated with the exposures to dust from this material.

Observations during this visit indicated dust exposures were not great enough to constitute a health hazard. It was noted that hand saws were being used to cut the insulation. The irritation is probably due to the fiberglass in the insulation and can be minimized by instituting the usual precautionary measures employed when handling other fiberglass insulations. Since power driven saws would evolve greater dust concentrations than hand saws, they should be equipped with local exhaust ventilation to control the dust problem should they be used to cut the insulation. Under present operating conditions it



is concluded that no serious dust exposures are associated with the installation of Careytemp insulation.

Thank you for your cooperation during this visit. If we may be of service to you in the future, please feel free to contact us.

Yours very truly,

/s/ Albert Edwards,
Industrial Hygiene Engineer

AE:cm

EXHIBIT "D"

JAMES O. PIERCE SC.D.
KETTERING LABORATORY
EDEN AND BETHESEDA AVENUE
CINCINNATI, OHIO 45219

January 2, 1968

Mr. Arthur P. Mueller
Research Division
Philip Carey Manufacturing Company
320 South Wayne Avenue
Cincinnati, Ohio 45215

Dear Mr. Mueller:

We have completed our analyses of samples of air taken during fabrication of Carey Temp insulation at the Union Carbide Plant in Charleston, West Virginia. I do not know if you wish to have a formal report, complete with recommendations, etc., for methods of control of dust. Unless I hear otherwise, I will assume that this letter will suffice.

I do not feel it necessary to describe to you the conditions under which these samples were taken, since you were present during the entire operation. All of the impinger samples were breathing zone samples collected directly below the face of the operator. These samples are representative of an individual's exposure to the dust produced at the operation in question.

The impinger samples numbered 1 through 3 were collected during one "run," whereas numbers 4 through 6 were taken during the second cutting operation. The electrostatic precipitator samples were located near the saw table and could not be as representative of breathing zone samples as are the impinger samples. In addition, a high volume air sampler was used to collect dust from the air during the total period of time we were there. This sample naturally includes some down-time.

The samples were analyzed by standard procedures. A sample of dust collected with the high volume air sampler



was prepared for examination by X-ray diffraction to determine the per cent of crystalline free silica and asbestos in the airborne dust. The X-ray diffraction pattern failed to indicate the presence of crystalline material in the dust. The probable limit of detection by X-ray diffraction for asbestos or quartz in untreated samples is approximately 5 per cent for each material.

Microscopic examination of the samples of dust indicated the presence of some fibers, but it was not always possible to differentiate between glass fibers or asbestos fibers. As you are aware, the threshold limit value for asbestos is 5 million particles per cubic foot of air and for inert or nuisance particulates this value is raised to 50 mppcf or 15 mg/m$^3$, whichever is the smaller (source: Threshold Limit Values for 1967, (ACGIH). Since asbestos is known to be an ingredient of the parent material, my personal recommendation would be to use the lower value even though the analysis indicated that the dust contained less than 5 per cent asbestos.

The results of the sampling are given in the attached table. If additional information is required, please do not hesitate to let me know. Also enclosed is a statement of charges involved, including charges for analyses incurred by the Kettering Laboratory. Please make the check payable directly to me personally for the full amount and I will reimburse the Laboratory.

Sincerely yours,

/s/ J. O. Pierce, Sc.D.
Assistant Professor of
Environmental Health

JOP:egm
Enclosures

RESULTS OF SURVEY AT THE UNION CARBIDE PLANT, CHARLESTON, WEST VIRGINIA DURING FABRICATION OF PHILIP CAREY (CAREY TEMPE) INSULATION BOARD

| DESCRIPTION AND LOCATION OF SAMPLER | MILLIONS OF PARTICLES PER CUBIC FOOT OF AIR Mppcf | MILLIGRAMS OF PARTICULATE PER CUBIC METER OF AIR $Mg/M^3$ |
|---|---|---|
| #1—Impinger—located at breathing zone of Mr. D. E. Raines, operator at saw #1 during unloading and cutting of insulation board | 16.4 | — |
| #2—Impinger—same as #1 except attached to other operator, Mr. W. L. Alford | 15.9 | — |
| #3—Impinger—located at breathing zone of Mr. J. Jordan, operator at saw #2 during first phase of sawing | 19.5 | — |
| #4—Impinger—located at breathing zone of Mr. W. L. Alford, operator at saw #2 during second phase of sawing operation | 19.9 | — |
| #5—Impinger—located at breathing zone of Mr. J. Jordan, operator at saw #2 during second phase of sawing operation | 23.8 | — |
| #6—Impinger—same as #5 except attached to other operator, Mr. H. Witt | 27.3 | — |
| #7—Electrostatic Precipitator Sampler—located appr. 5" above plate of saw #1 during first unloading and cutting cycle | 8.65 | 64.3 |



| DESCRIPTION AND LOCATION OF SAMPLER | MILLIONS OF PARTICLES PER CUBIC FOOT OF AIR Mppcf | MILLIGRAMS OF PARTICULATE PER CUBIC METER OF AIR $Mg/M^3$ |
|---|---|---|
| #8—Electrostatic Precipitator —located at same location as #7 during clean-up operation between runs | 5.5 | 29.1 |
| #9—Electrostatic Precipitator —located at saw #2, left side, appr. 8-10" above plate of saw during second phase of cutting operation | 3.0 | 21.1 |
| #10—High Volume Air Sampler using fluted filter—located at the right side, appr. 4" from saw #1 during entire operations | — | 37.3* |

*X-Ray Diffraction indicates no detectable crystalline material present in this sample

EXHIBIT "E"

AFFIDAVIT OF
STANLEY PETERS

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, STANLEY PETERS, being duly sworn and cautioned, state that:

1. I am employed by The Celotex Corporation as Manager of the Billing Department.

2. The Billing Department maintains a computerized list of sales invoices of all building and insulation products, dating back to the acquisition of the Panacon Corporation (formerly Philip Carey) in 1972.

3. The sales invoices are not separated into "Asbestos Containing" and "Asbestos Free" products.

4. In order to retrieve certain sales invoices, our Billing Department must have the exact name of the purchaser, his address and the year of the sale.

5. It is impossible to locate sales invoices for products shipped to a particular location. (except by an individual manual search.) The invoices are listed only by the company that made the purchase.

6. Approximately twenty thousand (20,000) sales invoices are generated during an average month within a given year.

7. In order to determine the invoices applicable for a requested period, one must manually research the computer generated customer list for each individual month. Following this, a manual search of the plant invoices series must be made in order to retrieve the actual sales invoice.

8. The search is a time consuming task. It takes approximately twenty (20) hours to research one company for one year.



FURTHER AFFIANT SAYETH NAUGHT.

/s/ STANLEY PETERS, Manager
BILLING DEPARTMENT
The Celotex Corporation

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Sworn and subscribed in my presence this 20th day of July, 1981.

/s/ Sharon L. Tomlinson
Notary Public
Notary Public State of Florida at Large
My Commission Expires Feb. 13, 1985.

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EXHIBIT "F"

AFFIDAVIT
OF
KEN BROWN

STATE OF OHIO
COUNTY OF HAMILTON

I, KEN BROWN, being duly sworn and cautioned, state that:

1. I am employed by The Celotex Corporation as Comptroller of the Lockland, Ohio plant. As such, I have the custody and control of certain invoice records located in the basement of our Lockland, Ohio plant.

2. The records begin in late 1967 and continue to the date when Panacon Corporation (formerly Philip Carey Corporation) was acquired by The Celotex Corporation in 1972. Since 1972, Celotex' records have been computerized and are maintained at the corporate headquarters in Tampa, Florida.

3. The invoice records are indexed by purchaser for some years and by the manufacturing plant for some years.

4. The invoice records are voluminous (approximately 1,000,000), and are not separated into "asbestos containing" and "asbestos-free" products.

5. Research to locate asbestos invoices indicating sales to a particular purchaser is virtually impossible, and would constitute an undue burden on this defendant.

6. Invoice records prior to 1967 have been previously destroyed in accordance with our long standing record retention policy.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Ken Brown
Comptroller
The Celotex Corporation



STATE OF OHIO
COUNTY OF HAMILTON

Sworn and subscribed in my presence
this 13th day of July, 1981.

/s/ H. Robert McClure
Notary Public in and for the
State of Ohio
County of Hamilton

## EXHIBIT "G"

THE INSURERS COVERING CELOTEX (AND PREDECESSORS), WITH POLICY NUMBERS AND TERMS OF COVERAGE, ARE:

| INSURER: | POLICY NO.: | TERM: |
|---|---|---|
| Aetna Life & Casualty | 23 AL 204811 SCA | 10/1/76 - 10/1/77 |
| Aetna Life & Casualty | 23 AL 204816 SCA | 7/16/76 - 10/1/76 |
| Aetna Life & Casualty | 23 AL 204803 SRA(Y) | 10/1/75 - 7/16/76 |
| Aetna Life & Casualty | 23 AL 198034 SRA(Y) | 10/1/74 - 10/1/75 |
| Aetna Life & Casualty | 23 AL 192782 SRA(Y) | 10/1/73 - 10/1/74 |
| Aetna Life & Casualty | 23 AL 111594 SRA(Y) | 10/1/72 - 10/1/73 |
| Continental Casualty | CCP 904-2677 | 4/18/72 - 10/1/72 |
| Continental Casualty | CCP 854-8750 | 1/1/71 - 4/18/72 |
| American Motorists | OZM 578-200 | 1/1/70 - 1/1/71 |
| American Motorists | 9ZM 578-200 | 1/1/69 - 1/1/70 |
| Employers of Wausau | 052900071407 | 1/1/68- 1/1/69 |
| General Accident | GLA 36-748-15 | 1/1/67 - 1/1/68 |
| General Accident | 1CG 427410 | 1/1/64 - 1/1/67 |
| General Accident | All Prior Coverage | |



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

JUDGE CHARLES R. RICHEY .

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett,

Deceased

Plaintiff

Vs.

JOHNS-MANVILLE SALES CORPORATION,
*et al.*

Defendants

## PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANT CELOTEX CORPORATION'S MOTION FOR SUMMARY JUDGMENT

(Filed October 20, 1981)

Comes now plaintiff, by and through counsel, and respectfully moves this Honorable Court for an Order denying defendant Celotex Corporation's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support thereof, plaintiff refers the Court to the attached Statement of Plaintiff in Opposition to Defendant's Statement of Material Facts, the Attached Statement of Genuine Issues pursuant to Local Rule 9(g), the attached Memorandum of Points and Authorities in Opposition to Motion of defendant Celotex Corporation for Summary Judgment, and to Exhibits A through F, all of

which are made a part hereof and incorporated by reference.

Respectfully submitted,

ASHCRAFT & GEREL

By /s/ Kevin B. Byrd
2000 L Street, N.W., Suite 700
Washington, D. C. 20036
202-783-6400
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

JUDGE CHARLES R. RICHEY

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett,
Deceased

Plaintiff

Vs:

JOHNS-MANVILLE SALES CORP, *et al.*

Defendants

## STATEMENT OF THE PLAINTIFF, MYRTLE NELL CATRETT, IN OPPOSITION TO DEFENDANT CELOTEX CORPORATION'S STATEMENT OF MATERIAL FACTS

In response to the Statement of Material Facts submitted by defendant Celotex Corporation and in addition thereto, plaintiff respectfully states:

1. Admitted.

2. Denied. Plaintiff's response to defendant's interrogatories propounded as to the issue of product identification of asbestos products to which plaintiff was exposed stated that responses would be supplied in plaintiff's supplemental answers to defendant's interrogatories. (See pages 25-26 of plaintiff's answer to interrogatories of all defendants submitted on June 26, 1981).

3. Denied. Plaintiff never received Celotex Corporation's Second Set of Interrogatories to Plaintiff and Second Request for Production of Documents.

Furthermore, these documents were never filed with the District Court of the District of Columbia. (See Exhibit *A*).

4. Denied. Plaintiff has answered all of defendant Celotex Corporation's interrogatories that have been propounded as of this date.[1]

5. Denied. Plaintiff further directs the Courts' attention to the attached Memorandum of Points and Authorities with supporting Exhibits *A* - *F*.

Respectfully submitted,

ASHCRAFT & GEREL
By /s/ Kevin B. Byrd
2000 L Street, N.W., Sutie (sic) 700
Washington, D. C. 20036
202-783-6400
Attorneys for Plaintiff

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[1]As a result of this Court's February 3, 1981 Order granting plaintiff's Motion for a Protective Order, plaintiff was relieved of her obligation to respond to Celotex's first set of interrogatories and request for documents. Pursuant to that same order plaintiff was to respond to defendant's joint interrogatories which she did on June 26, 1981.

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UNITED STATES DISTRICT COURT
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*et al.*

Defendants

## STATEMENT OF GENUINE ISSUES PURSUANT TO LOCAL RULE 9(g)

Plaintiff, Myrtle Nell Catrett, respectfully submits the following non-exclusive statement of genuine issues:

1. Whether the death of plaintiff's deceased husband Louis H. Catrett, was a result of defendant Celotex Corporation's design, manufacture, production, testing and labeling of asbestos materials and products.

2. Whether plaintiff's deceased husband was exposed to the defendant Celotex Corporation's asbestos products.

3. Whether defendant Celotex Corporation failed to adequately warn plaintiff's deceased husband of the hazards associated with the inhalation of asbestos fibers when defendant and/or its predecessors became aware of potential health hazards in the mid-1960's. (See Celotex answers to plaintiff's interrogatories, number 55, Exhibit F).

4. Whether defendant Celotex Corporation failed to adequately warn the plaintiff's deceased husband that protective equipment should be used when working with defendant's products containing asbestos.

5. Whether defendant Celotex Corporation failed to properly design and manufacture asbestos products for safe use under the conditions of use that were reasonably anticipated.

6. Whether defendant Celotex Corporation failed to properly test its asbestos products for hazards prior to placing these goods in commerce.

7. Whether defendant Celotex Corporation failed to provide instructions for the safe and proper use of asbestos products.

8. Whether defendant Celotex Corporation failed to remove asbestos products from the stream of commerce even after the defendant knew, or in the exercise of reasonable care should have known, that these products were unsafe for use by consumers under any circumstances.

9. Whether the death of plaintiff's husband was a direct and proximate result of the breach of express warranties made by the defendant, Celotex Corporation.

10. Whether as a direct result of the breach of warranties, and strict liability of the defendant, Celotex Corporation, plaintiff's deceased husband developed malignant mesothelioma, asbestosis, and other pulmonary ailments which resulted in his death on September 3, 1979.

11. Whether the illness, injury and damage suffered by plaintiff's deceased husband was a direct result of defendant Celotex Corporation's conduct which was intentional; or so reckless, willful and wanton in nature as to



rise to the level of intentional action, exhibiting reckless indifference to the health and well being of the plaintiff's deceased husband.

Respectfully submitted,

ASHCRAFT & GEREL
By /s/ Kevin B. Byrd
2000 L Street, N.W., Suite 700
Washington, D. C. 20036
202-783-6400
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

JUDGE CHARLES R. RICHEY

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett,
Deceased

Plaintiff

Vs.

JOHNS-MANVILLE Sales Corporation,
*et al.*

Defendants

# PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF DEFENDANT CELOTEX CORPORATION FOR SUMMARY JUDGMENT

Plaintiff, Myrtle Nell Catrett, respectfully submits that Summary Judgment would be inappropriate because defendant has failed to carry its burden of establishing that there is no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law.

A motion for summary judgment is designed to determine whether there is a genuine material factual dispute for trial. *Business Equipment Center, Ltd.* v. *De Jur-Amsco,* 465 F.Supp 778, 783 (D.D.C. 1978). Rule 56 of the Federal Rules of Civil Procedure explicitly requires that the moving party show that he is entitled to judgment as a matter of law. *Federal Rules of Civil Procedure 56(c).* This has been interpreted to mean that summary judgment should not be granted unless the truth is clear, *Poller* v. *Columbia Broadcasting Systems, Inc.,* 82 S.Ct. 486, 368 U.S. 464, 7 L.Ed.2d 458 (1962); *Washington* v. *Cameron,* 411 F.2d 705, 133 U.S. App. D.C. 391 (1969), or unless the



moving party demonstrates a right to judgment with such clarity as to leave no room for controversy and he shows affirmatively that the opposing party cannot prevail under any circumstances. *Nyhus* v. *Travel Management Corporation,* 466 F.2d 440 (D.C. Cir 1972).

The defendant Celotex Corporation has failed to meet its burden of proving that there is no genuine factual dispute for trial. Its motion, in fact, resembles more closely a motion to compel answers to interrogatories than a motion for summary judgment. The plaintiff has responded to the only set of interrogatories that have been propounded by the defendant. Defendant's allegations that additional interrogatories and a request for production of documents were propounded and sent to the plaintiff on June 30, 1981 are untrue. The plaintiff has never received these documents and they have never been filed with the Court. (See Exhibit *A*).[1]

The plaintiff responded in its answers to all defendant's interrogatories submitted on June 26, 1981 that identification of asbestos products to which plaintiff's deceased husband was exposed would be supplied with plaintiff's supplemental answers to defendants' interrogatories. (See Exhibit *B*). Defendant Celotex has not submitted any further interrogatories and for this reason alone is premature in moving for summary judgment. In general, summary judgment normally should not be granted before

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[1]Plaintiff requested the Clerk of the Court on October 20, 1981 to make a thorough search of the court record to ascertain if defendant Celotex Corporation's second set of interrogatories and second request for production of documents were ever filed. The Court Record did not contain such documents and the civil docket sheet is attached as Exhibit *A* to evidence this fact.

discovery is completed. *Murrell* v. *Bennet,* 615 F.2d 306 (5th Cir. 1980). *Alabama Farm Bureau Mutual Casualty Company, Inc.* v. *American Fidelity Life Insurance Company,* 606 F.2d 602, 609 (5th Cir. 1979). See C. Wright & A. Miller, *Federal Practice and Procedure,* Vol. 10 § 1273 (1973). This standard should be applied to the instant action which involves complex issues, many parties, and a long history of development. Plaintiff's deceased husband worked for approximately twenty-five years as a plasterer with extensive exposure to asbestos products. During this time period he was employed at approximately forty-seven (47) different worksites throughout the country. The granting of a motion for summary judgment in light of the present posture of the necessarily lengthy discovery process would be premature.

Defendant Celotex Corporation contends in its Motion for Summary Judgment that the plaintiff has failed to prove that the plaintiff's deceased husband was exposed to Celotex products and hence cannot recover for the death of her husband. Assuming arguendo that the plaintiff must produce this evidence when discovery is still pending, the plaintiff directs the Court's attention to Exhibits *C, D,* and *E.*

Exhibit *C* is a letter to the plaintiff's workmen's compensation attorney from Mr. William O'Keefe, a Claims Representative for Aetna Casualty & Surety, the compensation carrier for Anning & Johnson Company, plaintiff's deceased husband's employer in 1970 and 1971. Exhibit *D* is a letter from Mr. T. R. Hoff, Assistant Secretary for Anning & Johnson Company, to Mr. O'Keefe. These documents clearly establish that plaintiff's deceased husband was exposed to an asbestos product of defendant while in



his employment with Anning & Johnson Company. As Mr. Hoff states:

> ". . . the only asbestos that Mr. Catrett came into contact while working for Anning & Johnson Company was called fire-bar . . . . The manufacturer of this product was Carey-Canada, Inc. and Carey-Canadian Asbestos. Carey-Canada, Inc. was ultimately purchased by Celotex Corporation . . ."

At the very least, these exhibits demonstrate that there is a genuine material factual dispute for trial. The plaintiff has evinced the essential link between the defendant's product and her husband, and it should be a question for the jury as to whether this was the proximate cause of the decedant's injuries and ultimate death. Moreover, it is generally recognized that issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner. *Ross* v. *John's Bargain Stores Corp.,* 464 F.2d 111, 115 (5th Cir., 1972); see *Moore's Federal Practice,* Vol. 6, Paragraph 56.17 (42).

Exhibit *E,* a copy of plaintiff's deceased husband's deposition taken on July 17, 1979 for use in his workmen's compensation claim, is being submitted to be considered in support of plaintiff's allegations that her deceased husband was exposed to defendant Celotex Corporation's asbestos products which, it has been alleged, were the proximate cause of his death. Use may be made of all depositions lawfully taken and duly filed in a former action which involved the same subject matter and the same parties or their privies as the action at bar. See, *Moore's Federal Practice,* Vol 6 Paragraph 56.15 (1-2). Plaintiff concedes that this requirement would bar the introduction of the deposition of Louis H. Catrett, but plaintiff is offer-

ing this document for the limited purpose of showing that there is a material fact in issue. As stated in Wright's on the Federal Rules of Procedure, the cases seem to indicate that judges will be quite demanding in their examination of the moving party's papers, but will treat the papers of the party opposing the motion indulgently, *Whittlin* v. *Giacalone,* 154 F.2d 20, 22, 81 U.S. App. D.C. 20 (1964)", C. Wright & A. Miller, *Federal Practice and Procedure,* Vol. 10 § 2738.

Mr. Catrett in his deposition identified two of defendant Celotex Corporation's asbestos products to which he was exposed during his employment. (See pages 26-30, 34, and 72 of Exhibit *E*). His exposure to fire-bar, a Celotex product, has been arguably established as well by Exhibits *C* and *D*. Clearly this evidence shows that there are material issues of fact in dispute and that the matters presented in connection with this motion must be construed in the light most favorable to the party opposing a motion for summary judgment. *U.S.* v. *Diebold, Inc.,* 82 S.Ct. 993, 369 U.S. 654, 8 L.Ed.2d 176 (1962); *U.S.* v. *General Motors Corp.,* 518 F.2d 420 (D.C. Cir. 1975); 171 U.S. App. D.C. 27.

Lastly, defendant Celotex Corporation has failed to provide any affidavits or exhibits which justify their motion for summary judgment. This is an essential element of a motion for summary judgment because it forces the parties to produce evidence beyond their pleadings. The burden is on the moving party to prove that there is no genuine issue as to any material fact. Defendant has failed to prove that it did not supply plaintiff's deceased husband's employers with its products and in fact has never even suggested that such sales never took place. Defendant clearly has not meet (sic) the burden imposed by Rule 56 of the Federal Rules of Civil Procedure. Recent cases in this circuit indicate that the court must be satisfied that the moving party has clearly established the appropriateness of summary judgment before affirming. *Habib* v. *Raytheon Co.,* 616 F.2d 1204, 1208 (D.C. Cir. 1980); *U.S.* v. *General Motors, supra.; Washington* v. *Cameron, supra.* The defendant has not established that it is entitled to such relief and therefore its motion for summary judgment should be denied.



## CONCLUSION

Since the court must resolve all ambiguities in favor of the party against whom summary judgment is sought, the Court should deny defendant's motion and allow plaintiff to proceed with discovery. The defendant has not carried the burden of demonstrating its entitlement to summary judgment beyond a reasonable doubt. *See James* v. *Atchison, Topeka and Santa Fe,* 464 F.2d 173 (10th Cir. 1972) "The issue of material fact required by Rule 56(e) to be present to entitle a party to proceed to trial is *not required to be resolved conclusively* in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a judge or jury to resolve the parties' differing versions of the truth at trial." (Emphasis added). *First National Bank of Ariz.* v. *Cities Service Co.,* 391 U.S. 253, 288-289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

Plaintiff respectfully submits that the proffered exhibits, when viewed in the light most favorable to plaintiff, are sufficient to support the existence of a factual dispute.

Respectfully submitted,

ASHCRAFT & GEREL
By /s/ Kevin B. Byrd
2000 L Street, N.W., Suite 700
Washington, D. C. 20036
202-783-6400
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

JUDGE CHARLES R. RICHEY

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett,
Deceased

Plaintiff

Vs.

JOHNS-MANVILLE SALES CORPORATION,
*et al.*

Defendants

*ORDER*

Upon consideration of defendant Celotex Corporation's Motion for Summary Judgment and plaintiff's Opposition thereto, it is this —— day of ————, 1981,

ORDERED that defendant Celotex Corporation's Motion for Summary Judgment be, and the same hereby is,

DENIED.

———————————

JUDGE CHARLES R. RICHEY

(Certificate of Service omitted in printing)

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# EXHIBIT "A"

CIVIL DOCKET CONTINUATION SHEET

| PLAINTIFF | DEFENDANT | Docket No. 80-2232 |
|---|---|---|
| MYRTLE NELL CATRETT | JOHNS-MANVILLE SALES CORP., et al | page .. of .. pages |

| PARTIES | | ATTORNEYS |
|---|---|---|
| MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased. | | |
| v. | | |
| 1. JOHNS-MANVILLE SALES CORPORATION | -1- | ROBERT E. SCOTT, JR., etal<br>1025 Conn. Ave., NW<br>Suite 414<br>Washington, D.C. (36)<br>(202) 822-8250<br>(deleted in original—<br>100 S. Washington Street<br>Rockville, Maryland 20850<br>(301) 762-7770) |
| 2. OWENS-CORNING FIBERGLASS CORPORATION | -2- | JOHN F. MAHONEY, JR.<br>THOMAS M. HOGAN<br>925 Washington Bldg.<br>20005 — 347-6161 |
| 3. ARMSTRONG CORK COMPANY | -3- | FRANCIS J. FORD<br>17 W. Jefferson St.<br>Rockville, MD 20850<br>(301) 279-2000 |
| 4. GAF CORPORATION | -4- | LESLIE H. WIESENFELDER<br>1225 Connecticut Avenue,<br>Suite 500<br>Washington, D.C. 20036<br>(202) 862-8077 |
| 5. THE CELOTEX CORPORATION | -5- | WILLIAM G. McMURTRIE<br>8150 Leesburg Pike, #503<br>Vienna, VA 22180<br>(703) 821-0821 |
| 6. KEENE CORPORATION | -6- | Francis X. Quinn<br>25 Wood Lane,<br>Rockville, Md<br>20850 762-3303 |



| | | |
|---|---|---|
| 7. EAGLE PITCHER INDUSTRIES, INC. | -7- | CHARLES E. CHANNING, JR.<br>P.O. Box 550<br>Upper Marlboro, MD 20870<br>(301) 627-5500 |
| 8. FIBREBOARD CORPORATION | -8- | PAUL F. SHERIDAN<br>1911 North Fort Myer Drive<br>Suite 800<br>Arlington, Virginia 22209<br>(703) 524-5400 |
| 9. NICOLET, INC. | | |
| 10. PITTSBURGH CORNING CORPORATION | — | JAMES C. GREGG<br>1625 K Street, N.W.<br>Washington, D.C. 20006<br>(202) 393-3390 |
| 11. RAYBESTOS-MANHATTAN, INC. | — | (deleted in original—<br>William F. BECKER—<br>see bel<br>27 W. Jefferson Street<br>Rockville, MD 20850<br>(301) 424-7762) |
| 12. UNARCO INDUSTRIES, INC. | — | JOHN JUDE O'DONNELL<br>730 15th St., N.W. #810 (05)<br>(202) 628-2244 |
| 13. FORTY-EIGHT INSULATIONS, INC. | — | KEVIN J. McCARTHY<br>96 Harry S. Truman Drive<br>Upper Marlboro, Md. 20870<br>(301) 350-1300 |
| 14. SOUTHERN TEXTILE CORPORATION | | |
| 15. TURNER & NEWALL | — | Michael M. Maney<br>(deleted in original—<br>Richard J. Rawson)<br>Chas. E. Do (sic)<br>1775 Pennsylvania Ave.,<br>N.W. (202) 857-1000 |
| | 11. | ROBERT P. WATKINS<br>839 17th Street, N.W.<br>Washington, D.C. 20006<br>(202) 331-5000 |

| PLAINTIFFS | DEFENDANTS |
|---|---|
| MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, deceased. | JOHNS-MANVILLE SALES CORPORATION, et al. |

RICHEY, J.

(SEE PRECEEDING PAGE FOR COMPLETE CAPTION.)

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED, AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC 1332. COMPLAINT for wrongful death and Survival action.

ATTORNEYS

Kevin B. Byrd
2101 L Street, N.W., Suite 303
Washington, D.C. 20037
(202) 783-6400

RELEVANT DOCKET ENTRIES

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1980 | | |
| Sept 2 | 1 | COMPLAINT; Appearance; Jury demand. |
| Sept 2 | | SUMMONS (39) and copies (39) of complaint issued. C.T. Corp; Systems Ser: 9-9-80. defts. 2, 3, 4, & 5 ser: 9-12-80. Deft. #6 ser: 9-17-80. defts. 7-14 Ser: 9-22-80. |
| Sept 22 | 2 | ANSWERS of deft. #10. |
| Sept 24 | 3 | ANSWER of deft. #11 to complaint. |
| Sept 24 | 4 | ANSWER of deft. #13 to complaint. |
| Sept 24 | 5 | APPEARANCE of Michael M. Maney and Richard J. Rawson as counsel for deft. #15. CD/N |
| Sept 25 | 6 | ANSWER of deft #12 to complaint. |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| Sept 25 | 7 | REQUEST of deft. #7 for production inspection and copying of documents. |
| Sept 25 | 8 | INTERROGATORIES by deft. #7 to pltf. |
| Sept 25 | 9 | ANSWER of deft. #7 to complaint. |
| Sept 29 | 10 | ANSWER of deft. #8 to complaint; jury demand. |
| Sept 29 | 11 | ANSWER of deft. #1 to complaint. |
| Sept 29 | 12 | REQUEST of deft. #1 for inspection and copying of documents. |
| Sept 29 | 13 | INTERROGATORIES of deft. #1 to pltf. |
| Sept 29 | 14 | STIPULATION filed 9-25-80, and Order extending time for deft. Turner & Newell Ltd. to answer or move re complaint to and including 10-24-80. (N) HART, J. |
| Sept 30 | 15 | ANSWER of deft. #4; cross claim Vs. defts. 1-3 & 5-15. |
| Oct 01 | 16 | ANSWER of deft. #2 to the complaint. |
| Oct 03 | 17 | ANSWER of deft. #5 to complaint. |
| Oct 03 | 18 | ANSWER of deft. #5 to cross-claim. |
| Oct 03 | 19 | ANSWER of deft. #3 to complaint. |
| Oct 03 | 20 | ANSWER of deft. #10 to cross-claim. |
| Oct 06 | 21 | ANSWER of deft. #13 to cross-claim. |
| Oct 06 | 22 | ANSWER of deft. #8 to cross-claim. |
| Oct 06 | 23 | INTERROGATORIES of deft. #12 to pltf. |
| Oct 06 | 24 | ANSWER of deft. #12 to cross-claim. |
| Oct 10 | 25 | INTERROGATORIES of deft. #5 to pltf. |
| Oct 10 | 26 | FIRST REQUEST of deft. for production and inspection of documents. |
| Oct 10 | 27 | INTERROGATORIES by deft. #13 to pltf. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| Oct 14 | 28 | ANSWER of deft. #1 to cross-claim. |
| Oct 15 | 29 | MOTION of deft. #9 to dismiss complaint for lack of jurisdiction over the person, insufficiency of process and improper venue, or in the alternative, to quash service of process; P&A's; attachment. |
| Oct 16 | 30 | ANSWER of deft. #7 to cross-claim of deft. #4. |
| Oct 16 | 31 | ANSWER of deft. #14 to complaint. |
| Oct 17 | 32 | REQUEST of deft. #5 for production of documents. |
| Oct 23 | 33 | INTERROGATORIES (first set) by deft. #4 to pltf. and first request for the production of documents. |
| Oct 24 | 34 | MOTION of deft. #15, to dismiss for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process, memorandum; table of contents; table of citations; exhibits A&B. |
| Oct 27 | 35 | ANSWER of deft. #14 to cross-claim of deft. #4. |
| Oct 31 | 36 | INTERROGATORIES by deft. #8 to pltf. |
| Nov 06 | 37 | ORDER filed Nov. 4, 1980 granting motion of deft. Nicolet, Inc. to quash service and dismissing the complaint as to said deft. (N) Hart, J. |
| Nov 14 | 38 | ANSWER by deft. #6 to complaint. |
| Nov 14 | 39 | ANSWER by deft. #6 to cross-claim of deft. #4. |
| Nov 24 | 40 | FIRST SET of INTERROGATORIES by deft. #14, and motion to produce. |
| Nov 28 | 41 | INTERROGATORIES by deft. #11 to pltf. |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| Dec 22 | 42 | CASE Reassigned from Judge Hart to Judge Richey on 12/18/80. |
| Dec 31 | 43 | INTERROGATORIES by deft. Pittsburgh-Corning Corporation to pltf. |
| Dec 31 | 44 | REQUEST by deft. Pittsburgh-Corning Corporation for production, inspection and copying of documents. |
| 1981 | | |
| Jan 06 | 45 | MOTION of pltf. for a protective order pursuant to Federal Rules of Civil Procedure 26(c): P&A's. |
| Jan 19 | 46 | OPPOSITION by deft to pltf's. motion for a protective order; P&A's. |
| Feb 13 | 47 | INTERROGATORIES by defts. to pltf. |
| Feb 18 | | STATUS CALL: Parties to apply for early trial date in CA 79-1337 before Judge Hart; Court to advise Judge Hart on Status of CA 79-1337 and CA 80-22-32. (Rep. M. Colchico) RICHEY, J. |
| Mar 04 | 48 | NOTICE by deft. #1 to take deposition of Mr. Carlton Sickles. |
| Mar 17 | 49 | FIRST SET of interrogatories by pltf.; exhibit A. |
| Apr 04 | 50 | NOTICE by deft. #4 of deposition of Joseph Koonz. |
| Apr 06 | 51 | NOTICE by deft. #1 of the deposition of Joseph Koonz, Esq. |
| Apr 06 | 52 | MOTION of Joseph H. Koonz, Jr. for a protective order pursuant to FRCP 26(c); P&A's; exhibits A-C. |
| Apr 7 | 53 | COPY of OPPOSITION by defts. #1, 2, 4, 11 and 14 to motion for protective order; attachment. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| Apr 15 | 54 | RESPONSES by deft. #4 to pltfs. first set of interrogatories. |
| May 26 | 55 | ANSWER by deft. to pltf's. first set of interrogatories; affidavit of W. H. Offermann; attachment. |
| June 9 | 56 | APPEARANCE of Robert P. Watkins and Williams and Connoly as counsel for deft. #11 and withdrawing Richard H. Lerch, Patrick G. Cull. Lerch & Huesman and William F. Becker. CD/N |
| June 10 | 57 | ANSWERS by deft. #14 to interrogatories. |
| June 16 | 58 | ANSWERS by deft. #12 to interrogatories by pltf. |
| June 22 | 59 | WITHDRAW Richard J. Rawson as counsel for deft. #15 and substitute Charles E. Dorkey III, CD/N. |
| June 23 | 60 | INTERROGATORIES by deft. to pltf. |
| June 29 | 61 | ANSWERS by pltf. to interrogatories; attachment; items A-F (in green binder); items A-O (in blue binder). |
| July 6 | 62 | INTERROGATORIES (second set) by deft. Gaf Corporation to pltf. and second request for the production of documents. |
| July 6 | 63 | INTERROGATORIES (first set) by deft. Keene Corporation and request for production. |
| July 8 | 64 | ANSWERS by deft. to Interrogatories; attachment. |
| July 8 | 65 | INTERROGATORIES by deft. #14 to pltf. |
| July 13 | 66 | INTERROGATORIES by deft. #13 to pltf. |
| July 24 | 67 | INTERROGATORIES by deft. #1 to pltf. |



| DATE | NR | |
|---|---|---|
| July 27 | 68 | MOTION by defts. to compel discovery or in the alternative a motion to dismiss; memorandum; exhibit 1; attachment. |
| Aug 05 | 69 | CHANGE OF ADDRESS of counsel for deft. #1. CD/N |
| Aug 10 | 70 | WITHDRAWAL of Appearance of Charles E. Wilson as counsel for deft. #1. CD/N |
| Aug 12 | 71 | NOTICE of cross-claims by agreement of counsel. |
| Aug 17 | 72 | MOTION of deft. #4 for summary judgment; statement of material facts P&A's. |
| Aug 28 | 73 | APPEARANCE of Frederick M. Baron as co-counsel for pltf. CD/N |
| Aug 31 | 74 | STIPULATION filed 8-28-81, extending time to 9-4-81 for pltf. to respond to motion of deft. GAF Corporation for Summary Judgment, Approved. (N) (Fiat) RICHEY, J. |
| Sept 4 | 75 | RESPONSE by pltf. to motion of deft. #4 for summary judgment. |
| Sept 17 | 76 | SUPPLEMENTAL INTERROGATORIES by deft. #10 to pltfs. and request for the production of documents. |
| Sept 28 | 77 | MOTION by Deft. #5 for summary judgment; statement of material facts; P&As. |
| Oct 01 | 78 | MOTION by deft. #12 for summary judgment; statement; P&As. |
| Oct 01 | 79 | ORDER filed 9-29-81, granting motion of deft. GAF Corp. for summary judgment; dismissing the complaint as to deft. GAF Corp. with prejudice. (N) RICHEY, J. |
| Oct 02 | 80 | RESPONSES by deft. #5 to interrogatories; exhibits A-G. |
| Oct 05 | 81 | SUPPLEMENTAL INTERROGATORIES by deft. #8 to pltf. |

DATE NR

Oct 06 82 ANSWERS of deft. #6 to interrogatories; attachment.

Oct 09 83 INTERROGATORIES (second set) by deft. to pltf.

Oct 13 84 STIPULATION filed 10-9-81 extending time to 10-20-81 for pltf. to respond to motion of deft. Celotex Corp. for summary judgment. (N) RICHEY, J.

Oct 13 85 MOTION of deft. #6, Kenne (sic) Corporation for summary judgment; statement of material facts; P&A's.

Oct 14 86 RESPONSE of pltf. to motion of deft. Unarco Industries, Inc. for summary judgment.

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EXHIBIT "B"

• • •

*Interrogatory No. 50:* State which magazines and/or newspapers you and/or your spouse have subscribed to and/or which you and/or your spouse regularly purchased over-the-counter for the past twenty years.

*Answer:* None.

*Interrogatory No. 51:* Please identify all past employers in whose employ your husband came into contact with asbestos or materials containing asbestos and include in your answer for each such employer: (a) name and address; (b) job title and work description; (c) identity of all of your husband's foremen or supervisors; (d) type and identity of each such asbestos material with which your husband had contact, including the trade or brand name and manufacturer if known; (e) whether the employer provided safety equipment such as respirators or masks to reduce or prevent exposure to asbestos material; (f) whether the employer required that employees use safety equipment of type referred to in sub part (d) above; (g) whether the employer ever recommended that such safety equipment be used by its employees; (h) whether the employer provided showers for employees; (i) whether the employer provided separate lockers for work and personal clothing; (j) whether company-sponsored physical examinations were required or made available. If your answer is in the affirmative, state: (1) whether required or optional; (2) frequency of examinations; (3) nature and extent of examinations; (4) whether x-ray examination was included; (5) frequency—including specific dates and times—with which your husband submitted to such examinations; (6) your husband's detailed reasons for

failing to submit to such examinations when required or made available; (7) results of each such examination of your husband's body; and, (8) identify the examining physician, nurse or technician.

*Answer:* Plaintiffs will attempt to supply answers to Interrogatory No. 51 in Plaintiff's Supplemental Answers to Plaintiff's Interrogatories.

*Interrogatory No. 52:* With respect to each separate job or project on which your husband worked with or around asbestos or materials containing asbestos while employed by the persons listed in response to the preceding Interrogatory, please state separately the following as to each such job or project: (a) the name and address of the employer for whom your husband worked; (b) the location of each job (stating the plant site, city, county and state); (c) the beginning and ending dates of the job; (d) the name and the manufacturer of each and every product containing asbestos with which your husband worked or was exposed to on the particular job and a general description of each such product; (e) identify your husband's immediate supervisor or job superintendent on such job; (f) identify all persons with whom your husband worked on such job; and (g) the approvimate (sic) length of time that your husband worked on each such job.

*Answer:* Plaintiffs will attempts (sic) to supply answers to Interrogatory No. 52 in Plaintiff's Supplemental Answers to Plaintiff's Interrogatories.

*Interrogatory No. 53:* Did your husband ever complete, in whole or in part, a questionnaire provided to him by any labor union, relating to the subjects of occupational



health and exposure to asbestos? If your answer is in the affirmative, please state as to each questionnaire: (a) the date your husband received such questionnaire; (b) the date your husband completed such questionnaire; (c) the name of the union providing such questionnaire; (d) the name and address of the individual, union or entity to whom the questionnaire was returnable; (e) whether or not your (sic) possess a copy of the questionnaire as completed by your husband; (f) name and address of each individual, union or entity possessing a copy of your husband's completed questionnaire.

*Answer:* Mrs. Catrett has no knowledge whether or not her husband ever completed a questionnaire by any labor union regarding occupational health and exposure to asbestos. (a) thru (f) not applicable.

*Interrogatory No. 54:* Did your husband ever attend any international or local union meetings, seminars, conferences or conventions where the subjects of occupational health and exposure to asbestos were discussed? If your answer is in the affirmative, please state: (a) the date and place of such meeting, seminar, conference or convention; (b) the name and address of the speaker or discussion; and (c) a summary of such speech presentation or discussion.

*Answer:* Mrs. Catrett has no knowledge whether or not her husband ever attended any international or local union meetings, seminars or conferences or conventions where the subjects of occupational health and exposure to asbestos were discussed. (a) thru (c) not applicable.

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EXHIBIT "C"

AETNA

Casualty & Surety Division
Washington, D.C. Office
P.O. Box 1556
Merrifield, Va. 22116
821-5500

October 15, 1981

Attorney James Green
Ashcraft and Gerel
2000 L Street, N.W.
Number 700
Washington, D.C. 20037

RE: OUR INSURED: Anning-Johnson Company
CLAIMANT: Louis Catrett
DATE OF LOSS: 12/15/71

Dear Mr. Green:

Per your request, please be advised that the only asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company was called fire-bar supplied by Universal Fire-Bar Company, Inc., 607 S. Ball Street, Arlington, Virginia 22202.

Further be advised that Universal Fire-Bar is a dormant corporation that had its charter revoked by the state of Virginia in 1972 or 1973 for non-payment of taxes. At approximately the same time, a majority interest in this company was purchased by Blount Brothers Company, Inc., 2511 Fairlane Drive, Montgomery, Alabama 36104. According to our insured, this material was shipped out of Virginia. The manufacturer of this product was Carey-Canada, Inc. and Carey-Canadian Asbestos, P.O. Box 190, East Broughton, Quebec, Canada, GONIHO. Carey-Canada, Inc. was ultimately purchased by Celetex (sic) Corporation, A JIM WALTER CORPORATION, P.O. Box 22601, Tampa, Florida 33622. The manufacturer mined the asbestos to the specifications ordered by the supplier, Universal Fire-Bar Company, Inc.



Please advise whether there is any additional information that you will need in this matter. A letter stating precisely what is contained in this letter is to be sent to me by Mr. Terry Hoff of our insured company. You will be forwarded a copy of this communication when it is received. Please bring us up to date on the status of your third party liability claim so that we can resolve our end of this matter.

Sincerely,

/s/ William E. O'Keefe,
Claim Representative
Claim Department
Aetna Casualty and Surety

con

cc: Attorney Roger Mackey

Received Oct. 19, 1981.
Aetna Life Insurance Company / Aetna Life Insurance and Annuity Company / The Aetna Casualty and Surety Company / The Standard Fire Insurance Company.

EXHIBIT "D"

1959 ANSON DRIVE
MELROSE PARK, IL. 60160
Chicago (312) 261-3636
Suburbs (312) 681-1300
October 15, 1981

AETNA CASUALTY & SURETY
Washington D.C. Office
P.O. Box 1556
Merrifield, VA 22116

RE: Louis Catrett (deceased)

Dear Mr. O'Keefe:

I apologize for not getting back to your September 8, 1981 letter sooner.

This letter will confirm our telephone conversation of yesterday. Mr. Catrett worked for us one calendar year ending, 12/22/71. His duties were to supervise and train crews in the application of Firebar Fireproofing. He worked only in new construction and traveled from district to district.

The Fireproofing product known as Firebar was distributed by:

Universal Firebar, Inc.
607 South Ball Street
Arlington, VA 22202

Their charter was revoked by the State of Virginia in 1973. Prior to 1973,

Blount Brothers Corporation
2511 Fairlane Drive
Montgomery, Alabama 36104

purchased a substantial interest in Universal Firebar Corporation.



The material was manufactured by:

Carey-Canada Inc. & Carey-Canadian Asbestos
P.O. Box 190
East Broughton, Quebec
Canada, GONIHO

Which is now owned by:

Celotex Corporation
a Jim Walters Corporation
P.O. Box 22601
Tampa, Florida 33622

We understand that the Firebar product was manufactured by Carey-Canadian. Universal Firebar Corporation may have played a roll in developing the spedifications (sic) for the product. It is our understanding that Hartford Accident and Indemnity was Universal Firebar's general liability during this time period.

Please keep us informed.

/s/ T. R. Hoff,
Assistant Secretary

TRH/1d1

Atlanta - Chicago - Indianapolis - Knoxville - Los Angeles
New Orleans - Orlando - San Francisco - Washington, D.C.

Oct. 19, 1981

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EXHIBIT "E"

UNITED STATES DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF
WORKERS' COMPENSATION PROGRAMS
D. C. COMPENSATION DISTRICT

Case No. 137167

Louis Catrett, Jr.
Claimant

Anning & Johnson
Employer

Aetna Casualty & Surety
Insurance Carrier

Washington, D.C.
Tuesday, July 17, 1979

Deposition of LOUIS H. CATRETT, JR., Plaintiff herein, called for examination by Counsel for Plaintiff in the above-entitled action, pursuant to notice of taking deposition de bene esse, and having been duly sworn by PATRICIA A. FOYE, a Notary Public in and for the District of Columbia, in the offices of Bushnell, Gage, Reizen & Byington, 1800 L Street, N.W., Suite 301, Washington, D.C., commencing at 10:08 a.m. on Tuesday, July 17, 1979, and the proceedings being taken down by PATRICIA A. FOYE and transcribed by her.

STEWART, POE & OGLESBY, INC.
Reporting Services
711 Fourteenth Street, N.W.
Washington, D.C. 20005
(202) 347-9898

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(p. 2) APPEARANCES:

On behalf of Plaintiff:

MARK E. REIZEN, Esq.
MARY MARTHA McNAMARA, Esq.
Bushnell, Gage, Reizen & Byington
1899 L Street, N. W.
Suite 301
Washington, D. C. 20036

On behalf of Insurance Carrier:

CONRAD A. FONTAINE, Esq.
ROGER S. MACKEY, Esq.
7926 Jones Branch Drive
Suite 1090
McLean, Virginia 22102

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CONTENTS


| Deposition of: | Examination by Counsel for Plaintiff | Examination by Counsel for Insurance Carrier |
|---|---|---|
| Louis H. Catrett, Jr. | 4, 96 | 45, 96 |


* * *

(p. 26) Q. You're talking about your work clothes?

A. Yes, my work clothes. My wife would send them out rather than stop up the washing machine.

Q. Now, in 1963 you obtained other employment; is that correct?

A. Yes, I did.

Q. Where was that?

A. It was with Fire-Bar.

Q. Is that a hyphenated word, Fire-Bar?

A. Yes.

Q. Where are they located or where were they located?

A. They were located in North—in South Arlington.

Q. What kind of work did you do for them?

A. There I went from formulation, mixing, applying. everything. We did everything.

Q. This was essentially the same kind of process you described at your previous employer?

A. To a degree it is; to a degree it wasn't. This was a cementatious material and the other was a dry fiber

Q. When you say cementatious, was it in a different form?

A. It's a wet mix.

Q. It came to you wet?

(p. 27) A. No; it came to us dry. And then we would mix the—it was Carey (phonetic) Asbestos 7-M.

Q. That's the grit size, 7-M?

A. Yes. And we would mix that with magnesite and epsom salts.

Q. Did those come in bags?

A. Yes.

Q. What kind of bags?

A. Paper bags with polyethylene liners.

Q. Describe for us how you mixed that particular formulation.



A. Well, at the beginning we'd dump it all out on the floor of the warehouse and mix it all together and bag it back up and weigh it.

But later on we used regular mixers for it. And even at this time we had no knowledge of it being dangerous to the health.

Q. How would you mix it?

A. Shovels and rakes.

Q. You participated in that process?

A. Yes, sir, I did.

Q. How many days a week were you working at that?

(p. 28) A. Six days a week.

Q. Did you also do the spraying of the asbestos?

A. Yes, I did.

Q. Did you do any traveling for Fire-Bar?

A. I did, yes, quite extensively.

Q. Describe that for us, if you would.

A. Well, until we had all of our test results in, I had to go to Chicago quite frequently and set up tests, spray them and burn them to establish the hour per thickness of material for protection rating.

Q. What was located in Chicago?

A. UL Laboratories.

Q. Again, you did wear a respirator or did not?

A. We wore respirators at this time, yes, but no hand protection or anything.

Q. Were you still able to observe particulate matter on you or asbestos material on you?

A. Oh, sure. You were covered with it.

Q. Was this on a daily basis?

A. Daily basis, yes, sir.

Q. Now, the next company you went to work for was whom?

A. I believe you'll find it was the federal government.

(p. 29) Q. In what capacity?

A. As plasterer, maintenance plasterer.

Q. Where specifically did you work?

A. House Office buildings.

Q. Do you know whether or not you were exposed to asbestos during that period of time?

A. I could have well been exposed to it by the fact that our little office was in a fan room that had asbestos coverings on all the lines. And you would see dust around all over the floor which was commonly known as asbestos dust.

Q. Was it on your clothing also?

A. It was on your clothing, yes, sir.

Q. And your capacity at that time was plasterer and maintenance?

A. Yes, sir.

Q. Where did you go next?

A. Next—



Q. That was from '66 to 1969; is that correct?

A. Yes. Next, I believe, Mario & DiBono.

Q. M-a-r-i-o and D-i capital B-o-n-o?

A. Yes.

Q. Plastering company?

(p. 30) A. Yes.

Q. Where are they located? Do you know?

A. They had an office in Long Island and Manhattan.

Q. In what capacity did you work for them?

A. I worked for them as a plasterer. I also worked for them as trainer, training them how to use Fire-Bar.

Q. That was the asbestos material?

A. Yes, that's an asbestos material.

Q. What type of asbestos did you use at that time?

A. Carey Asbestos 7-M.

Q. Is that the cementatious?

A. That was cementatious Fire-Bar product.

Q. What buildings did you work on using that product?

A. I worked on the U. S. Steel Building and the McGraw-Hill Building, Rockefeller Center.

Q. New York City?

A. Right.

Q. Did you use material other than Fire-Bar?

A. During this particular time, yes. We worked on the World Trade Center, and that was Cafco.

Q. C-a-f-c-o?

A. Right.

(p. 31) Q. Do you know who manufactured that product?

A. United States Materials or—

Q. United States Mineral Products?

A. That's right; United States Mineral Products.

Q. They're located in Stanhope, New Jersey?

A. Yes.

Q. While working on those buildings did you wear respirators?

A. We wore respirators, yes.

Q. Do you know what type of respirator you wore?

A. The specific numbers on them I don't know. We wore two types. There was a carbon canister and there was also one with a paper filter.

Q. Did these preclude your inhalation of the asbestos?

A. Supposedly, but it didn't.

Q. Did you still cough up the asbestos?

A. Yes, you would.

Q. When you blew your nose did you still observe asbestos?

A. Yes, you did.



Q. Did you receive any literature from any of those manufacturers or employers regarding asbestos exposure?

A. No, sir, I didn't.

(p. 32) Q. Was there any warning on the packages that you recall?

A. Not on the packages.

Q. You worked for Mario & DiBono until when?

A. Until 1970, I believe.

Q. Up until that time did you have any health problems which you were aware of?

A. Not that I was aware of, no, sir.

Q. Had you received any medical treatment for asbestos exposure during that period?

A. No, sir.

Q. 1970 or 1971 you went to work for whom?

A. Anning & Johnson.

Q. Would you tell us how that employment situation arose?

A. Yes. Mr. Bucco, which is the owner of Fire-Bar, brought an architect in from Chicago to observe the job with hopes of selling the CNA Building in Chicago to be fireproofed.

Q. What building was this?

A. This was on the U. S. Steel Building they came to in New York.

Q. What occurred?

A. I was approached and hired by Anning & Johnson at this time.

(p. 33) Q. Do you remember the individual's name who approached you and hired you?

A. Wayne Cisper (phoentic) was one of them. I don't recall the chairman of the board's name.

Q. On what basis did they hire you?

A. That I should train and set up crews to do their work in different areas of the country.

Q. When they hired you, did you take a physical examination?

A. No, sir, I did not.

Q. You were in good health at that time?

A. Yes, sir.

Q. Did you fill out an employment application?

A. Yes, sir, I did.

Q. Did you note any health problems on that application?

A. I didn't have any to note.

Q. Do you recall what your starting rate of pay was at that time?

A. I believe it was 17,400.

Q. That's per annum?

A. Yes.

Q. How many days a week were you working?



(p. 34) A. Six days a week.

Q. How many hours per day?

A. Ten, 12 hours a day.

Q. You were a salaried employee?

A. I was a salaried employee, yes.

Q. Do you recall your average weekly wage at that time?

A. Honestly I don't recall the average weekly wage because I'd never seen a check the whole time. It was sent to my wife here in Washington, and I was on expenses for Anning & Johnson.

Q. How long did you work for Anning & Johnson?

A. Until December of '72, I believe—December of '71.

Q. Why did your employment cease at that time?

A. Clean Air Act. You couldn't use asbestos products anymore in the fireproofing of steel. And Fire-Bar did not see fit to clean up their material to meet the federal specifications. So they had no need for my employment anymore.

Q. What kind of materials did you use while employed for Anning & Johnson?

A. I used Fire-Bar and I used Monokote (phonetic).

Q. Were there different grades of Monokote?

A. Yes. Monokote had a MK-3 at this time and an MK-4.

(p. 35) Q. You used both?

A. I used both. MK-3 had asbestos in it.

Q. Did MK-4?

A. MK-4 was in the process of cleaning up their materials and was supposed to be asbestos-free.

Q. Do you know who manufactured Monokote?

A. Yes; W. R. Grace.

Q. Grace Chemical Company?

A. Grace Chemical Company, yes.

Q. Did you wear a respirator during that period of exposure?

A. We wore respirators, yes, sir.

Q. Were there any warnings on the bags at that time?

A. No.

Q. During this training program were you exposed to the asbestos while employed by Anning & Johnson?

A. Yes, I was, in every phase, from the pumproom —and in this case your pumproom might be located ten or 12 floors below the area that you were applying the material. And, of course, the machines was of the rotor-stator type machines, and the stators would go bad and you'd have to replace them occasionally.

(p. 36) Q. That indicates what? An auger type of—

A. Yes, it is the auger type.

Q. — application?

And with the respirators did you still have those materials in your nose and mouth?



A. Oh, yes, you still had them, yes.

Q. Did you notice it on a continual basis or an infrequent basis?

A. Every day you'd have in your nostrils asbestos, and you would cough up a little after getting off from work.

Q. Were you a supervisor while you were there?

A. Yes, I was.

Q. You indicate you still participated in the application?

A. I did. I had to. In order to train you had to participate more so than anyone else.

Q. Would you say your exposure was daily or —

A. Daily, yes.

Q. You didn't sit behind a desk?

A. I did not sit behind a desk. And the only time I had that I was not associated with it was traveling from one point to another.

(p. 37) Q. Was that during normal working hours when you traveled?

A. Not usually.

Q. When was it?

A. At night, after working hours.

Q. After you left Anning & Johnson, where did you commence employment?

A. Blazier-Pierce.

Q. In what capacity?

A. I was foreman of the labor department.

Q. What kind of work did you do?

A. Fireproofing and plastering, drywall.

Q. Subsequent to your employment with Anning & Johnson, did you have any exposure to asbestos?

A. Subsequent to the . . .

Q. After you terminated with Anning & Johnson, did you ever again have exposure to asbestos?

A. Not to my knowledge.

Q. How long did you work for this next company?

A. I think it was about a year.

Q. Is that B-l-a-z-i-e-r dash P-i-e-r-c-e?

A. Correct.



EXHIBIT "F"

• • •

53. Does Defendant expect to call expert witnesses at the trial of this case?

*Answer.* Unknown at this time.

54. If the answer to Interrogatory No. 53 is affirmative, state:

(a) The name, address, and job title of each expert witness.

(b) The testimony expected to be given by each expert witness.

*Answer.* See response to No. 53 above.

55. On what date did Defendant first become aware the inaalation (sic) of asbestos fibers by human beings could cause adverse health consequences?

*Answer.* Celotex now recognizes that prolonged inhalation of high concentrations of asbestos fibers may pose a potential health hazard. Defendant believes that its predecessors became aware of this possibility in the mid-1960's shortly before our predecessor's Careytemp product became asbestos-free. An article by Irving Selikoff, M.D., et al, published in the Annals of the New York Academy of Sciences on December 31, 1965, was the first epidemiological study which informed the medical, scientific and manufacturing communities of a possible health hazard to insulation applicators.

56. Does Defendant contend that asbestos products can be manufactured so as to eliminate all potential health hazards to workers working with them?

*Answer.* Defendant objects to this interrogatory on the grounds that the phrase "so as to eliminate all potential health hazards" is vague and ambiguous. Also, any answer to this question would be meaningless, inasmuch as a manufacturer is not a guarantor, and cannot be held to such a standard of eliminating "all" potential health hazards. For example, a glass bottle manufacturer could not eliminate the possibility that someone might accidentally drop an otherwise safe bottle and cut themselves. Defendant submits that many reasonable people believe that "anything is possible!". Without waiving any of the aforesaid objections, Defendnt (sic) states that it believes currently

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION, et al

Defendants

PRAECIPE

Will the Court kindly withdraw the Motion of Summary Judgment previously submitted by the Celotex Corporation.

By /s/ William G. McMurtrie
(#207720)
8150 Leesburg Pike
Suite 503
Vienna, Virginia 22180
(703) 821-0821

(Certificate of Service omitted in printing)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORP., et al

Defendants

SECOND SET OF INTERROGATORIES

(Filed November 24, 1981)

TO: Myrtle Nell Catrett

FROM: The Celotex Corporation

PLEASE TAKE NOTICE that the following Interrogatories are propounded by Defendant The Celotex Corporation to the Plaintiff pursuant to Rule 33 of the Federal Rules of Civil Procedure, said rule providing that interrogatories shall be answered separately and fully in writing under oath by said Plaintiff and a copy thereof served upon counsel for said Defendant within thirty (30) days after service of these interrogatories upon you.

1. State all facts which you contend support your claim of punitive damages against Defendant The Celotex Corporation.

2. Set forth with particularity each and every document you intend to introduct (sic) at trial in support of your claim for punitive damages against The Celotex Corporation and set forth a summary of the contents of each said document.



3. State the name and address of each and every lay witness you intend to call in support of your claim for punitive damages against The Celotex Corporation.

4. State the names and addresses of all expert witnesses you intend to call in support of the claims for punitive damages and with respect to each state the following:

(a) The subject matter on which the expert is expected to testify.

(b) The qualifications of each such expert.

(c) The substance of the facts and opinions to which the expert is expected to testify.

(d) A summary of the grounds for each opinion.

HADEN, RHATIGAN &
MCMURTRIE, P.C.
8150 Leesburg Pike
Suite 503
Vienna, Virginia 22180
(703) 821-0821

By: /s/ William G. McMurtrie
(#207720)
Counsel for The Celotex Corporation

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT
Administratrix of the
Estate of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORP., et al

Defendants

## MOTION OF DEFENDANT CELOTEX CORPORATION FOR SUMMARY JUDGMENT

(Filed December 23, 1981)

Defendant Celotex Corporation, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged within the jurisdictional limits of this Court.

In support of this Motion, defendant Celotex Corporation relies upon the Memorandum of Points and Authorities and Statement of Material Facts as to Which There is no Genuine Issue attached hereto.

Respectfully submitted,

HADEN, RHATIGAN &
MCMURTRIE, P.C.

/s/ William G. McMurtrie (#207720)
Counsel for Defendant Celotex
8150 Leesburg Pike, Suite 503
Vienna, Virginia 22180
(703) 821-0821

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT
Administratrix of the Estate
of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORP., et al

Defendants

## STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Defendant Celotex Corporation hereby respectfully submits to the Court, pursuant to Local Rule 1-9(h), its statement of material facts as to which there is no genuine issue.

1. On September 17, 1980, plaintiff Myrtle Nell Catrett brought suit in this Court alleging that his death on September 3, 1979 from lung cancer resulted from exposure to asbestos and asbestos products designed, manufactured, and distributed by fifteen companies including Celotex Corporation.

2. In response to Defendants' Combined First Set of Interrogatories plaintiff failed to state any fact or produce any evidence to show that the decedent used or came into contact with any product containing asbestos designed, manufactured, or distributed by Celotex Corporation within the jurisdictional limits of this Court.

3. Celotex Corporation, in Interrogatories and Request for Production of Documents, asked plaintiff, *inter*

*alia,* to describe all incidences of exposure of the decedent to products containing asbestos designed, manufactured or distributed by defendant Celotex Corporation and asked further for any evidence that any such product caused injury to or contributed to the death of the decedent.

4. Plaintiff has not answered the Interrogatories of Celotex Corporation or produced any documents, and the time for doing so now has passed.

5. There is no evidence whatsoever that the decedent was ever exposed to any product containing asbestos designed, manufactured, or distributed by Celotex Corporation, or that any such product was in any way the proximate cause of the decedent's death within the jurisdictional limits of this Court.

HADEN, RHATIGAN &
MCMURTRIE, P.C.

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Wililam G. McMurtrie (#207720)
Counsel for Celotex Corporation
8150 Leesburg Pike, Suite 503
Vienna, Virginia 22180

(Certificate of Service omitted in printing)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2232

MYRTLE NELL CATRETT
Administratrix of the Estate
of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORP., et al

Defendants

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANT CELOTEX CORPORATION FOR SUMMARY JUDGMENT

This action was instituted by plaintiff as Administratrix of the Estate of Louis H. Catrett against fifteen defendants, each of which is alleged to have designed, manufactured and distributed products containing asbestos. The action sounds in negligence, breach of warranty, and strict liability.

The action is based upon an allegation that the decedent was employed as an asbestos insulation installer from 1957 to 1972, and "(d)uring the entire period of time, he sued (sic), installed, removed and frequently came into contact with asbestos and asbestos-products designed, manufactured and distributed by the Defendants." (Complaint P. 5). It is claimed that the contact was the direct cause of Mr. Catrett's cancer and subsequent death.

All fifteen defendants propounded a set of Interrogatories to plaintiff seeking information concerning who the decedent's employers were during the period in question.

and what type and brand of asbestos materials were used at each job. See Defendant's Combined Interrogatory No. 51. Plaintiff failed to respond to the Interrogatory. See Plaintiff's Answer to Interrogatory No. 51.

Defendant Celotex Corporation subsequently propounded its own set of Interrogatories to plaintiff asking specifically whether, in what circumstances, and in whose employ the decedent came into contact with any asbestos materials designed, manufactured, or distributed by Celotex Corporation. Plaintiff has not responded to those interrogatories, and the time within which she had to respond has now passed.

## ARGUMENT

A Motion for Summary Judgment is designed to determine whether there is a genuine material factual dispute for trial. *Business Equipment Center, Ltd. v. DeJur-Amsco*, 465 F. Supp. 775, 783 (D.D.C. 1978). Thus, "the burden of proving that there is no genuine issue as to any material fact is on the moving party, but once the moving party has submitted a properly supported Motion for Summary Judgment, Rule 56(e) requires the opposing party to produce at least some credible evidence beyond pleadings in response." *Merit Motors, Inc. v. Chrysler Corp.*, 187 U.S. App. D.C. 11, 13, 569 F. 2d 666, 668 (D.C. Cir. 1977).

It is therefore incumbent upon the opponent of a Motion for Summary Judgment to disclose "credible evidence for its position," and "summary judgment cannot be defeated by the vague hope that



something may turn up at trial." *E. P. Hinkel & Co. v. Manhattan Co.*, 165 U.S. App. D.C. 140, 144, 506 F. 2d 201, 205 (D.C. Cir. 1974). The applicable rest (sic) for assessing the instant motion is whether, when "viewed in the light most favorable to the party opposing the motion", there remains a genuine issue of material fact for trial, or whether the case can be decided as a matter of law. *National Ass'n of Gov't Employees v. Campbell*, 192 U.S. App. D.C. 369, 373, 593 F. 2d 1023, 1027 (D.C. Cir. 1978).

An essential element of plaintiff's case against Celotex Corporation is proximate cause. She must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence within the jurisdictional confines of this Court. In fact, the decedent at page 74 of his deposition taken during the course of his claim for Workmen's Compensation benefits stated that "I never worked for them specifically in the District of Columbia. I never had an occastion (sic) to work out of the Washington, D. C. office." This further confirms the position of the defendant Celotex Corporation that the plaintiff was never exposed to asbestos-containing products within the jurisdiction of this Court.

Because she does not show any proximate cause between products designed, manufactured, or distributed by Celotex Corporation within the jurisdictional limits of this Court and the decedent's death, she cannot recover from Celotex Xorporation (sic) for any injuries sustained as a result of his death. Consequently as a matter of law, for the reasons stated herein, Celotex Corporation is en-

titled to judgment. The Complaint against Celotex Corporation should be dismissed with prejudice.

Respectfully submitted,

HADEN, RHATIGAN &
MCMURTRIE, P.C.

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Wililam G. McMurtrie (#207720)
Counsel for Defendant Celotex
8150 Leesburg Pike, Suite 503
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(Certificate of Service omitted in printing)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2232

JUDGE RICHEY

MYRTLE NELL CATRETT
Administratrix of the
Estate of Louis H. Catrett
Plaintiff

v.

JOHNS-MANVILLE SALES CORP., et al
Defendants

ORDER

UPON consideration of the Motion by Defendant Celotex Corporation for Summary Judgment, and upon consideration of the entire record herein, it is by the Court this — day of ———, 198—,

ORDERED that the Motion of Defendant Celotex Corporation for Summary Judgment is grnated (sic); and it is further

ORDERED that the Complaint is dismissed as to defendant Celotex Corporation with prejudice.

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JUDGE CHARLES R. RICHEY

COPIES TO:

Kevin B. Byrd, Esquire
2000 L. Street, N.W. #700
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-2232

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
et al.

Defendants

## PLAINTIFF'S ANSWERS TO DEFENDANT CELOTEX CORPORATIONS SECOND SET OF INTERROGATORIES

(Filed December 28, 1981)

Comes now the plaintiff, Myrtle Nell Catrett, Administratrix of the estate of Louis H. Catrett, and responds to the interrogatories propounded by the defendant as follows:

1. State all facts which you contend support your claim of punitive damages against Defendant The Celotex Corporation.

1. *ANSWER*

The facts are as stated and set forth in the Civil Complaint.

2. Set forth with particularity each and every document you intend to introduce at trial in support of your claim for punitive damages against The Celotex Corporation and set forth a summary of the contents of each such document.



2. *ANSWER*

Plaintiff responds that she is not presently in possession of such documents. Discovery is continuing and such documents will be provided if and when received.

3. State the name and address of each and every lay witness you intend to call in support of your claim for punitive damages against The Celotex Corporation.

3. *ANSWER*

Myrtle Catrett
2217 Naylor Road, S.E.
Washington, D.C. 20020

Co-Workers of Louis Catrett
Names and addresses will be furnished as they are ascertained.

4. State the names and addresses of all expert witnesses you intend to call in support of the claims for punitive damages and with respect to each state the following:

(a) The subject matter on which the expert is expected to testify.

(b) The qualifications of each such expert.

(c) The substance of the facts and opinions to which the expert is expected to testify.

(d) A summary of the grounds for each opinion.

4. *ANSWER*

Barry I. Castleman
1722 Linden Avenue
Baltimore, MD 21217

(a) Subject Matter: Mr. Castleman's testimony will encompass the history of asbestos use by the defendants and the dangerous propensity of their products.

(b) See enclosed Curriculum Vital (sic) of Barry I. Castleman.

(c) See plaintiff's response to 4(a).

(d) A summary of the grounds for each opinion proffered by Barry I. Castleman will be contained in his summarization of the use of asbestos through the years and the concomitant knowledge of the defendants in the inherent use of their products.

Additional expert witnesses will be named as they become available.

Respectfully submitted,

/s/ Kevin B. Byrd, Esquire

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

Judge Charles R. Richey

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased

Plaintiff

Vs.

JOHNS-MANVILLE SALES CORPORATION,
et al.

Defendants

# PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANT CELOTEX CORPORATION'S MOTION FOR SUMMARY JUDGMENT

(Filed January 4, 1982)

Comes now plaintiff, by and through counsel, and respectfully moves this Honorable Court for an Order denying defendant Celotex Corporation's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support thereof, plaintiff refers the Court to the attached Statement of Plaintiff in Opposition to Defendant's Statement of Material Facts, the Attached Statement of Genuine Issues pursuant to Local Rule 9(g), the attached Memorandum of Points and Authorities in Opposition to Motion of defendant Celotex Corporation for Summary Judgment, and to Exhibits A through C all of which are made a part hereof and incorporated by reference.

Respectfully submitted,

ASHCRAFT & GEREL

By: /s/ Kevin B. Byrd
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
202-783-6400
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

Judge Charles R. Richey

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased

Plaintiff

Vs.

JOHNS-MANVILLE SALES CORPORATION,
*et al.*

Defendants

## STATEMENT OF THE PLAINTIFF, MYRTLE NELL CATRETT, IN OPPOSITION TO DEFENDANT CELOTEX CORPORATION'S STATEMENT OF MATERIAL FACTS

In response to the Statement of Material Facts submitted by defendant Celotex Corporation and in addition thereto, plaintiff respectfully states:

1. Admitted.

2. Denied. Plaintiff's response to defendant's interrogatories propounded as to the issue of product identification of asbestos products to which plaintiff was exposed stated that responses would be supplied in plaintiff's supplemental answers to defendant's interrogatories. (See pages 25-26 of plaintiff's answer to interrogatories of all defendants submitted on June 26, 1981).

3. Admitted.

4. Denied. Plaintiff's Answers to Defendant's second set of interrogatories were submitted on December 28, 1981.

5. Denied. Plaintiff directs the Courts' attention to the attached Memorandum of Points and Authorities.

Respectfully submitted,

ASHCRAFT & GEREL

By: /s/ Kevin B. Byrd
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
202-783-6400
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

Judge Charles R. Richey

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased
Plaintiff

Vs.

JOHNS-MANVILLE SALES CORPORATION,
*et al.*
Defendants

STATEMENT OF GENUINE ISSUES PURSUANT TO LOCAL RULE 9(g)

Plaintiff, Myrtle Nell Catrett, respectfully submits the following non-exclusive statement of genuine issues:

1. Whether the death of plaintiff's deceased husband Louis H. Catrett, was a result of defendant Celotex Corporation's design, manufacture, production testing and labeling of asbestos materials and products.

2. Whether plaintiff's deceased husband was exposed to the defendant Celotex Corporation's asbestos products.

3. Whether defendant Celotex Corporation failed to adequately warn plaintiff's deceased husband of the hazards associated with the inhalation of asbestos fibers when defendant and/or its predecessors became aware of potential health hazards in the mid-1960's. (See Celotex answers to plaintiff's interrogatories, number 55, Exhibit A).

4. Whether defendant Celotex Corporation failed to adequately warn the plaintiff's deceased husband that protective equipment should be used when working with defendant's products containing asbestos.

5. Whether defendant Celotex Corporation failed to properly design and manufacture asbestos products for safe use under the conditions of use that were reasonably anticipated.

6. Whether defendant Celotex Corporation failed to properly test its asbestos products for hazards prior to placing these goods in commerce.

7. Whether defendant Celotex Corporation failed to provide instructions for the safe and proper use of asbestos products.

8. Whether defendant Celotex Corporation failed to remove asbestos products from the stream of commerce even after the defendant knew, or in the exercise of reasonable care should have known, that these products were unsafe for use by consumers under any circumstances.

9. Whether the death of plaintiff's husband was a direct and proximate result of the breach of express warranties made by the defendant, Celotex Corporation.

10. Whether as a direct result of the breach of warranties, and strict liability of the defendant, Celotex Corporation, plaintiff's deceased husband developed malignant mesothelioma, asbestosis, and other pulmonary ailments which resulted in his death on September 3, 1979.

11. Whether the illness, injury and damage suffered by plaintiff's deceased husband was a direct result of defendant Celotex Corporation's conduct which was intentional; or so reckless, willful and wanton in nature as to rise to the level of intentional action, exhibiting reckless indifference to the health and well being of the plaintiff's deceased husband.

Respectfully submitted,

ASHCRAFT & GEREL
By: /s/ Kevin B. Byrd
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
202-783-6400
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

Judge Charles R. Richey

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased

Plaintiff

Vs.

JOHNS-MANVILLE SALES CORPORATION, *et al.*

Defendants

## PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF DEFENDANT CELOTEX CORPORATION FOR SUMMARY JUDGMENT

Plaintiff, Myrtle Nell Catrett, respectfully submits that Summary Judgment would be inappropriate because defendant has failed to carry its burden of establishing that there is no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law.

A motion for summary judgment is designed to determine whether there is a genuine material factual dispute for trial. *Business Equipment Center, Ltd. v. De Jur-Amsco,* 465 F.Supp 778, 783 (D.D.C. 1978). Rule 56 of the Federal Rules of Civil Procedure explicitly requires that the moving party show that he is entitled to judgment as a matter of law. *Federal Rules of Civil Procedure 56 (c).* This has been interpreted to mean that summary judgment should not be granted unless the truth is clear, *Poller v. Columbia Broadcasting Systems, Inc.,* 82 S.Ct. 486, 368 U.S. 464 7 L.Ed.2d 458 (1962); *Washington v. Cameron,* 411 F.2d 705, 133 U.S. App. D.C. 391 (1969), or

unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy and he shows affirmatively that the opposing party cannot prevail under any circumstances. *Nyhus v. Travel Management Corporation,* 466 F.2d 440 (D.C. Cir. 1972). The defendant Celotex Corporation has failed to meet its burden of proving that there is no genuine factual dispute for trial.

Defendant Celotex Corporation contends in its motion for summary judgment that plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself." (Defendant Celotex Corporation's Memorandum of Points and Authorities, p. 3). In response thereto, plaintiff respectfully directs the Court's attention to Exhibits B, C, and D, all of which were provided to counsel for defendant Celotex Corporation when plaintiff opposed its original motion for summary judgment which was subsequently withdrawn.

Exhibit B is a letter to the plaintiff's workmen's compensation attorney from Mr. William O'Keefe, a Claims Representative for Aetna Casualty & Surety, the compensation carrier for Anning & Johnson Company, a plaintiff's deceased husband's employer in 1970 and 1971. Exhibit C is a letter from Mr. T. R. Hoff, Assistant Secretary for Anning & Johnson Company, to Mr. O'Keefe. These documents clearly establish that plaintiff's deceased husband was exposed to an asbestos product of defendant while in his employment with Anning & Johnson Company. As Mr. Hoff states:

> ". . . the only asbestos that Mr. Catrett came into contact while working for Anning & Johnson Company was called fire-bar . . . . The manufacturer of this product was Carey-Canada, Inc. and Carey-Canadian Asbestos. Carey-Canada, Inc. was ultimately purchased by Celotex Corporation . . ."



At the very least, these exhibits demonstrate that there is a genuine material factual dispute for trial. The plaintiff has evinced the essential link between the defendant's product and her husband, and it would be a question for the jury as to whether this was the proximate cause of the decedant's (sic) injuries and ultimate death. Moreover, it is generally recognized that issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner. *Ross v. John's Bargain Stores Corp.,* 464 F.2d 111, 115 (5th Cir. 1972); see *Moore's Federal Practice,* Vol. 6, Paragraph 56.17 (42).

Exhibit D, a copy of plaintiff's deceased husband's deposition taken on July 17, 1979 for use in his workmen's compensation claim, is being submitted to be considered in support of plaintiff's allegations that her deceased husband was exposed to defendant Celotex Corporation's asbestos products which, it has been alleged, were the proximate cause of his death.[1] Use may be made of all depositions lawfully taken and duly filed in a former action which involved the same subject matter and the same parties or their privies as the action at bar. See, *Moore's Federal Practice,* Vol 6 Paragraph 56.15 (1-2). Plaintiff concedes tha[4] this requirement would bar the introduction

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[1]Exhibit D was previously provided to the Court and all defendant's in plaintiff's first opposition to defendant Celotex Corporation's motion for summary judgment. Due to the length of this exhibit plaintiff respectfully refers the court to the copy originally provided.

of the deposition of Louis H. Catrett, but plaintiff is offering this document for the limited purpose of showing that there is a material fact in issue. As stated in Wright's on the Federal Rules of Procedure, the cases seem to indicate that courts will be quite demanding in their examination of the moving party's papers, but will treat the papers of the party opposing the motion indulgently, *Whittlin v. Giacalone,* 154 F.2d 20, 22, 81 U.S. App. D.C. 20 (1964)", C. Wright & A. Miller, Federal Practice and Procedure, Vol. 10 § 273.

Mr. Catrett in his deposition identified two of defendant Celotex Corporation's asbestos products to which he was exposed during his employment. (See pages 26-30, 34 and 72 of Exhibit D). His exposure to fire-bar, a Celotex product, has been established as well by Exhibits B and C. Clearly this evidence shows that there are material issues of fact in dispute and that the matters presented in connection with this motion must be construed in the light most favorable to the party opposing a motion for summary judgment. *U.S. v. Diebold, Inc.,* 82 S.Ct. 993, 369 U.S. 654, 8 L.Ed.2d 176 (1962); *U.S. v. General Motors Corp.,* 518 F.2d 420 (D.C. Cir. 1975); 171 U.S. App. D.C. 27.

Moreover, defendant Celotex Corporation has failed to provide any affidavits or exhibits which justify its motion for summary judgment. Such support is an essential element of a motion for summary judgment because it forces the parties to produce evidence beyond their pleadings. The burden is on the moving party to prove that there is no genuine issue as to any material fact. Defendant has failed to prove that it did not supply



plaintiff's deceased husband's employers with its products and in fact has never even suggested that such sales never took place. Defendant clearly has not met the burden imposed by Rule 56 of the Federal Rules of Civil Procedure. Recent cases in this circuit indicate that the court must be satisfied that the moving party has clearly established the appropriateness of summary judgment before affirming. *Habib v. Raytheon Co.,* 616 F.2d 1204, 1208 (D.C. Cir. 1980); *U.S. v. General Motors, supra.; Washington v. Cameron, supra.* The defendant has not established that it is entitled to such relief, therefore, its motion for summary judgment should be denied.

Finally, defendant alleges that "plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged within the jurisdictional limits of this Court." As has been previously stated and as the attached exhibits clearly demonstrate, plaintiff's deceased husband was exposed to asbestos-containing products of defendant Celotex Corporation. Furthermore, as defendant Celotex readily admits in its answers to plaintiff's interrogatories, it possesses a certificate of authority to do business in the District of Columbia. Moreover, while the initial insult to plaintiff's deceased husband's body as a result of his exposure to defendant Celotex Corporation's products occurred outside the District of Columbia, the ongoing disease process of mesothelioma caused his death in the District of Columbia. Even assuming *arguendo* that defendant's position that plaintiff's deceased husband inhaled and ingested defendant's asbestos fibers only in Illinois and not in the District of Columbia is correct, in no way can it be argued

that the continual tortius (sic) effects of defendant's defective products did not have their ultimate result in the District of Columbia.

## CONCLUSION

Since the court must resolve all ambiguities in favor of the party against whom summary judgment is sought, the Court should deny defendant's motion and allow plaintiff to proceed with discovery. The defendant has not carried the burden of demonstrating its entitlement to summary judgment beyond a reasonable doubt. See *James v. Atchison, Topeka and Santa Fe*, 464 F.2d 173 (10th Cir. 1972) "The issue of material fact required by Rule 56(e) to be present to entitle a party to proceed to trial is *not required to be resolved conclusively* in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a judge or jury to resolve the parties' differing versions of the truth at trial." (Emphasis added). *First National Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 288-289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

Plaintiff respectfully submits that the proferred (sic) exhibits, when viewed in the light most favorable to plaintiff, are sufficient to support the existence of a factual dispute.

Respectfully submitted,

ASHCRAFT & GEREL

By: /s/ Kevin B. Byrd
2000 L Street, N.W.,
Suite 700
Washington, D.C. 20036
202-783-5400
Attorneys for Plaintiff

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## EXHIBIT A

* * *

53. Does Defendant expect to call expert witnesses at the trial of this case?

*Answer.* Unknown at this time.

54. If the answer to Interrogatory No. 53 is affirmative, state:

(a) The name, address, and job title of each expert witness.

(b) The testimony expected to be given by each expert witness.

*Answer.* See response to No. 53 above.

55. On what date did Defendant first become aware that inaalation (sic) of asbesto fibers by human beings could cause adverse health consequences?

*Answer.* Celotex now recognizes that prolonged inhalation of high concentrations of asbestos fibers may pose a potential health hazard. Defendant believes that its predecessors became aware of this possibility in the mid-1960's shortly before our predecessor's Careytemp product became asbestos-free. An article by Irving Selikoff, M.D., et al, published in the Annals of the New York Academy of Sciences on December 31, 1965, was the first epidemiological study which informed the medical, scientific and manufacturing communities of a possible health hazard to insulation applicators.

56. Does Defendant contend that asbestos products can be manufactured so as to eliminate all potential health hazards to workers working with them?

*Answer.* Defendant objects to this interrogatory on the grounds that the phrase "so as to eliminate all potential health hazards" is vague and ambiguous. Also, any answer to this question would be meaningless, inasmuch as a manufacturer is not a guarantor, and cannot be held to such a standard of eliminating "all" potential health hazards. For example, a glass bottle manufacturer could not eliminate the possibility that someone might accidentally drop an otherwise safe bottle and cut themselves. Defendant submits that many reasonable people believe that "anything is possible!". Without waiving any of the aforesaid objections, Defendnat (sic) states that it believes currently • • •

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EXHIBIT B

AETNA

Casualty & Surety Division
Washington, D.C. Office
P.O. Box 1556
Merrifield, Va. 22116
821-5500

October 15, 1981

Attorney James Green
Ashcraft and Gerel
2000 L Street, N.W.
Number 700
Washington, D.C. 20037

RE: OUR INSURED: Anning-Johnson Company
CLAIMANT: Louis Catrett
DATE OF LOSS: 12/15/71

Dear Mr. Green:

Per your request, please be advised that the only asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company was called fire-bar supplied by Universal Fire-Bar Company, Inc., 607 S. Ball Street, Arlington, Virginia 22202.

Further be advised that Universal Fire-Bar is a dormant corporation that had its charter revoked by the state of Virginia in 1972 or 1973 for non-payment of taxes. At approximately the same time, a majority interest in this company was purchased by Blount Brothers Company, Inc., 2511 Fairlane Drive, Montgomery, Alabama 36104.

According to our insured, this material was shipped out of Virginia. The manufacturer of this product was Carey-Canada, Inc. and Carey-Canadian Asbestos, P.O. Box 190, East Broughton, Quebec, Canada, GONIHO. Carey-Canada, Inc. was ultimately purchased by Celetex (sic) Corporation, A JIM WALTER CORPORATION, P.O. Box 22601, Tampa, Florida 33622. The manufacturer mined the asbestos to the specifications ordered by the supplier, Universal Fire-Bar Company, Inc.

Please advise whether there is any additional information that you will need in this matter. A letter stating precisely what is contained in this letter is to be sent to me by Mr. Terry Hoff of our insured company. You will be forwarded a copy of this communication when it is received. Please bring us up to date on the status of your third party liability claim so that we can resolve our end of this matter.

Sincerely,

/s/ William E. O'Keefe, Claim Representative
Claim Department
Aetna Casualty and Surety

con

cc: Attorney Roger Mackey

Received Oct. 19, 1981.
Aetna Life Insurance Company / Aetna Life Insurance and Annuity Company / The Aetna Casualty and Surety Company / The Standard Fire Insurance Company

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EXHIBIT C

1959 Anson Drive
Melrose Park, IL 60160
Chicago (312) 261-3636
Suburbs (312) 681-1300

October 15, 1981

AETNA CASUALTY & SURETY
Washington D.C. Office
P.O. Box 1556
Merrifield, VA 22116

RE: Louis Catrett (deceased)

Dear Mr. O'Keefe:

I apologize for not getting back to your September 8, 1981 letter sooner.

This letter will confirm our telephone conversation of yesterday. Mr. Catrett worked for us one calendar year ending, 12/22/71. His duties were to supervise and train crews in the application of Firebar Fireproofing. He worked only in new construction and traveled from district to district.

The Fireproofing product known as Firebar was distributed by:

Universal Firebar, Inc.
607 South Ball Street
Arlington, VA 22202

Their charter was revoked by the State of Virginia in 1973. Prior to 1973,

Blount Brothers Corporation
2511 Fairlane Drive
Montgomery, Alabama 36104

purchased a substantial interest in Universal Firebar Corporation.

The material was manufactured by:

Carey-Canada, Inc. & Carey-Canadian Asbestos
P.O. Box 190

East Broughton, Quebec
Canada, GONIHO

Which is now owned by:

Celotex Corporation
a Jim Walters Corporation
P.O. Box 22601
Tampa, Florida 33622

We understand that the Firebar product was manufactured by Carey-Canadian. Universal Firebar Corporation may have played a roll in developing the spedifications (sic) for the product. It is our understanding that Hartford Accident and Indemnity was Universal Firebar's general liability during this time period.

Please keep us informed.

/s/ T.R. Hoff
Assistant Secretary

TRH/1d1
Atlanta - Chicago - Indianapolis - Knoxville - Los Angeles
New Orleans - Orlando - San Francisco - Washington, D.C

Oct. 19, 1981

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EXHIBIT D

EXHIBIT D is reproduced as Exhibit E at pages 164-164L of the Joint Appendix.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

Judge Charles R. Richey

MYRTLE NELL CATRETT, Administratrix
of the Etsate of Louis H. Catrett, Deceased

Plaintiff

Vs.

JOHNS-MANVILLE SALES CORPORATION
*et al.*

Defendants

ORDER

Upon consideration of defendant Celotex Corporation's Motion for Summary Judgment and plaintiff's Opposition hereto, it is this —— day of ————, 1982.

ORDERED that defendant Celotex Corporation's Motion for Summary Judgment be, and the same hereby is,

DENIED.

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/s/ Judge Charles R. Richey

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-2232

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased

Plaintiff

Vs.

JOHNS-MANVILLE SALES CORPORATION,
*et al.*

Defendants

# PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANT'S INTERROGATORIES

(Filed February 1, 1982)

Comes now plaintiff, Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, by and through counsel, and supplements its answers to the master set of interrogatories propounded by the defendant as follows:

26. In regard to any person or persons having knowledge of facts relevant to the subject matter in this lawsuit:

(a) Identify the workers, including any fellow workers, foreman, superiors, etc., who have such knowledge.

(b) Identify any other persons, i.e., other than workers, who have such knowledge.

(c) Identify those persons identified whom you intend to produce as witnesses in the trial in this action.



26. *ANSWER:* (Supplemental)

(a) James Timmis, co-worker
13606 Old Columbia Pike
Silver Spring, Maryland

1(b) T. R. Hoff
Assistant Secretary
Anning-Johnson Company
1959 Anson Drive
Melrose Park, Illinois 60160

2(b) Richard W. Boyle
Secretary-Treasurer
Krafft-Murphy
3543 W. Braddock Road
Alexandria, Virginia

(c) All of the above.

48. State the name and address of each person whom you expect to call as an expert witness at trial as to any contention whether medical, cause and effect, activity of the defendant, or any other matter for which you intend to have expert testimony.

48. *ANSWER:* (Supplemental)

Joseph K. Wagoner, S.D. Hyg.
8310 Carrleigh Parkway
Springfield, Virginia 22152

A. Bennett Jenson, M.D.
Georgetown University Schools of
Medicine and Dentistry
Washington, D.C. 20007

Mark Cullen, M.D.
Director, General Occupational
Health Clinic
Yale University
333 Cedar Street
New Haven, Connecticut 06510

Richard J. Lurito, Ph. d.
4035 N. 27th Road
Arlington, Virginia 22207

49. State separately as to each expert the subject matter on which the said expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify, and set forth a summary of the grounds of each such opinion. Supplement this answer as you ascertain any additional witnesses.

49. *ANSWER:* (Supplemental)

Plaintiff responds by stating that Dr. Wagoner will testify as to the causal relationship between the inhalation of asbestos fibers and pleural and peritoneal mesothelioma.

Dr. Jenson will testify concerning the presence of asbestos bodies in Mr. Catrett's lung tissue.

Dr. Mark Cullen will render his expert opinion regarding the relationship between Louis Catrett's exposure to asbestos and his development of pleural and peritoneal mesthelioma.

Dr. Lurito will render his expert opinion as to the exonomic (sic) loss suffered by plantiff.

Plaintiff attaches herewith the curriculum vitae of Dr. Wagoner and Dr. Jenson.

/s/ Myrtle Nell Catrett

I do solemnly swear and affirm under the penalties of perjury that the contents of the foregoing document is true and correct to the best of my knowledge.

/s/ Myrtle Nell Catrett

ASHCRAFT & GEREL



By: /s/ Kevin B. Byrd
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036
(202) 783-6400
Attorney for Plaintiff

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 80-2232

Judge Richey

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased

Plaintiff

vs.

JOHNS-MANVILLE SALES CORPORATION,
*et al.*

Defendants

PLAINTIFF'S SUPPLEMENTAL AND CORRECTED ANSWERS TO DEFENDANT CELOTEX CORPORATION'S SECOND SET OF INTERROGATORIES

(Filed February 1, 1982)

Comes now plaintiff, Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, by and through counsel and supplements and corrects interrogatories propounded by the defendant as follows:

2. Set forth with particularity each and every document you intend to introduce at trial in support of your claim for punitive damages against The Celotex Corporation and set forth a summary of the contents of each such document.

*Answer* (Supplemental)

See Attachment A submitted herewith.

3. State the name and address of each and every lay witness you intend to call in support of your claim for punitive damages against The Celotex Corporation.



*Answer* (Corrected)

James Timmis
13606 Old Columbia Pike
Silver Spring, Maryland

Richard W. Boyle
Secretary-Treasurer
Krafft-Murphy Company
3543 W. Braddock Road
Alexandria, Virginia

ATTACHMENT A

The following is a non-inclusive list of documents to be used by plaintiff in support of her claim for punitive damages. These documents may be viewed, with appropriate notice, at the office of Ashcraft & Gerel, 2000 L Street, N.W., Suite 700, Washington, D.C.

1. Documents, entitled and referred to as the "Vorwald Reports."

2. Published studies generated from the Insulation Industry Hygiene Research Program of Mt. Sinai Hospital.

3. Article entitled "The Magic Mineral," New Yorker Magazine dated October 12, 1968.

4. Letter from Albert Edwards to F. R. Ray dated April 13, 1961.

5. Report from J. Pierce to Art Mueller dated January 2, 1981.

6. Article by Fleischer-Drinker entitled "A Health Survey of Piper Covering Operation in Constructing Naval Vessels."

7. Article by Dr. Selikoff, et al. published in Annals of New York Academy of Science on December 31, 1965. Article addresses the hazards to applicators.

8. A list, of all persons who have, before 1964, filed a claim against a Workers' Compensation carrier covering all defendants or any of its subsidiaries, alleging a disability resulting from cancer or mesothelioma.

9. All advertising materials and sales brochures, of any kind of character, distributed in connection with the sales or advertising of asbestos products manufactured, produced, sold, or distributed by all defendants.

10. The study entitled, "Experimental Studies of Asbestos" by Arthur Vorwald, Thomas Durlean, and Philip Pratt.

11. Death Report of Pierre Fradette in *Fradette v. Asbestos Corp., Ltd.,* expired 1954.

12. Medical reports on J. Ceriel Dobbelaire, an employee of UNARCO who died of Asbestosis, dated 1949.

13. Massachusetts Department of Labor and Industries Division of Occupational Hygiene, "Recommended Safe Practices Mineral Data Sheet", dated 1949.

14. Articles on "Disease Found in 25% of Small Business Workers", dated 1975.

15. Workers' Compensation Claims due to asbestos related diseases

Riley v. Johns-Manville, et al.
1959

McCarrell v. Armstrong Cork
1956

Brokenshire v. Armstrong Contracting and Supply
1964



16. Kaylo and Asbestos products in the 1939-1945 edition of Sweets Industrial Catalogue.

17. Article from Occupational Health (Journal for Occupational Health Nurses) 1964, by G. L. Leathart, M.D., entitled "Abestos (sic), a Medical Hazard of the 20th Century."

18. Article from the American Industrial Hygiene Association Journal dated 1972, entitled Application of Sprayed Inorganic Fiber containing asbestos: Occupational Health Hazards, by Drs. Rietze and Selikoff.

19. Article on Contstruction (sic) Health Hazards dispersed by the Michigan Department of Health 1963.

20. Keasley-Mattison advertisement from the 1961 edition of "Sweets" for Sprayed Limpet Asbestos.

21. Copy of dockworker, R. L. Casey's dipolma (sic) and class notes from "Limpet Asbestos Spray School".

22. A copy of a letter from R. L. Casey dated 1978, which states that workers were not told of the dangers of asbestos until 1969 when a co-worker read about the dangers in an issue of Readers Digest.

23. Article from Medical Intelligence by Brugsch and Barley entitled "Asbestosis in a Worker Engaged in Automobile Undercoating", 1961.

1935 Hurlbut, C., and C. Williams, The Mineralogy of Asbestos Dust. Jour. Ind. Hyg. Vol. 17(6), 289 (1935).

1938 Nordman, M., Occupational Cancer in Asbestos Workers. Leitschrift fur Krebsforschung Vol. 47, 288-302, (1938).

1946 Fleischer, W. E., F. Viles, R. Gade and P. Drinker. A Health Survey of Pipe Covering Operations in Constructing Naval Vessels. Jour. Ind. Hyg. Tox. Vol. 28(1), 9 (1946).

1947 Case Records of the Massachusetts General Hospital. New England Journal of Medicine Vol. 236(11), 407 (1947).

1948 Saita, G., Primary Lung Tumors of an Occupational Origin (Synthetic Review) Medicina del Lavaro. Vol. 39, 4, 105-116 (1948) / Asbestos Information Association North America.

1952 Doll R. and A. B. Hill. A Study of the Aetiology of Carcinoma of theLung (sic). British Medical Journal, December 13, 1952.

1954 Cutler, S. J., M. A. Schneiderman, S. W. Greenhouse. Some Statistical Considerations in the Study of Cancer in Industry. American Journal of Public Health, Vol. 44(9), 1159 (1954).

1955 Gardiner, J. F., Occupational Diseases of the Lungs. Nebraska S.M.J., 285 (1955).

1955 Conference on Environmental Carcinogens, September 12, 13, 1955.

1955 Smith, K., Pulmonary Disability in Asbestos Workers. A.M.A. Arch. Ind. Health. (1955).

1956 Francia, A., G. Monarca. Asbestosis and Pulmonary Carcinoma. Vol. 47, 1950-1959 (1956).

1957 Doll, R.A.B. Hill and L. Kreyberg. The Significance of Cell Type in Relation to the Aetiology of Lung Cancer. (1957).

1963 Farina, S & G. Mazzanti. Asbestosis and Lung Neoplasms Further Contribution to a Clinical Case. Lavaro Umano, Vol. 15, 276-281 (1963) / Asbestos Information Association of North America.



1964 Doll, R. and A. Bradford. Mortality in Relation to Smoking: Ten Years' Observations of British Doctors. Brit. Med. J. Vol. 1, 1460-1467 (1964).

Wagoner, J. K. A Chronological Accounting of Publications Concerning Asbestos-Related Diseases.

Selikoff, I. J. The Occurence of Pleural Calification Among Asbestos Insulation Workers. Annals New York Academy of Sciences.

Editorial. Asbestos and Cancer of the Lung.

Schall, E. L. Present Threshold Limit Value in the U.S.A. For Asbestos Dust: A Critique. Ann. N.Y. Acad. Sciences 316.

/s/ Myrtle Nell Catrett

I do solemnly swear and affirm under the penalties of perjury that the contents of the foregoing document is true and correct to the best of my knowledge.

/s/ Myrtle Nell Catrett

ASHCRAFT & GEREL

By: /s/ Kevin B. Byrd
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036
(202) 783-6400
Attorney for Plaintiff

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CIVIL ACTION 80-2232

---

MYRTLE NELL CATRETT,

PLAINTIFF,

V.

JOHNS-MANVILLE SALES CORPORATION, ET AL.,

DEFENDANTS.

---

Wednesday, July 21, 1982
Washington, D.C.

The above-entitled matter came on for a hearing before the Honorable CHARLES R. RICHEY, United States District Judge, Courtroom 11, commencing at approximately 1:00 p.m.

APPEARANCES: PETER NICHOLL, Esq., on behalf of the Plaintiff.

CHARLES DORKEY, Esq., FRANCIS FORD, Esq., and WILLIAM McMURTRIE, Esq., on behalf of the Defendants.

THIS TRANSCRIPT WAS PRODUCED BY
(COMPUTER AIDED TRANSCRIPTION)

Mindi L. Colchico
Official Court Reporter
6808 U.S. Courthouse
Washington, D.C. 20001

PROCEEDINGS

(p. 2) Deputy Clerk: Civil Action 80-2232, Myrtle Catrett versus Johns-Manville Sales Corporation, et al.



For the plaintiff, Peter Nicholl; for the defendant, Charles Dorkey, Francis Ford, and William McMurtrie.

The Court: Who represents Celotex?

Mr. McMurtrie: Mr. McMurtrie, Your Honor.

The Court: Come forward. Do you want to argue your motion? That is what we are here for.

Mr. McMurtrie: Your Honor, I have two motions pending, one the motion for summary judgment and in the alternative, a motion to transfer for lack of venue. In the primary motion, Your Honor, the motion for summary judgment, I will be very brief because the Court has all the information I believe that it needs.

Our position is strikingly similar, if not exactly the same, as Johns-Manville in that although we have a registered agent in this area there has been no product identification of any Celotex products, both carries Philip Carey products, Carey Canada products, what have you, that have been used in the District of Columbia to which the decedent was exposed.

By the plaintiff's own documents, its own response to the Celotex inquiry, well as the master set of interrogatories presented to this court, the only exposure (p. 3) to any Celotex product by the decedent was in Chicago and by documents attached to their answers to interrogatories, there is a letter from a T. R. Huff, who is the assistant secretary for a corporation known as Annand & Johnson, saying that he did work for their company during that period December 22, 1970 to December 22, 1971 and at that time his duties were to supervise and train crews in the application of a fire-bar fireproofing.

Now, in 1980, or 1981, the interrogatories were propounded, the master set as well as my supplemental set.

The Court gave them leave to file their answers to my supplemental set at a later date, February 9th, I believe, 1982. Those answers to date still would not satisfy that court as to product identification of any Celotex product or co-workers who would then identify on behalf of the decedent, exposure to asbestos products manufactured by Celotex Corporation in this area or in any other area, including Chicago.

Your Honor, there is only a letter from the assistant secretary and that is not - -

The Court: Doesn't plaintiff say that the decedent was exposed to your company's products in the area of Chicago.

Mr. McMurtrie: He suggested that there was exposure in Chicago, Your Honor. We do not admit that and (p. 4) there is no affidavit to support that. We only have a self serving answer to interrogatories.

The Court: That says?

Mr. McMurtrie: It simply says - - well, all it is is a letter from a Mr. T. R. Huff.

Now - -

The Court: What does it say?

Mr. McMurtrie: It simply says that his duties were to supervise and train crews in the application of a fire-bar fireproofing. He worked only in new construction and traveled from district to district. That was in Chicago. We also have, and they rely on this, the deposition of the decedent that was taken of him prior to his death for the compensation claim, which would not be admissible in this case either.

The Court: Why?



Mr. McMurtrie: Celotex was not there, had no opportunity to cross-examine this defendant or this decedent. But he does say, for the limited purposes of use in this motion, that he was not exposed to any product in the District of Columbia manufactured by Celotex. He only worked in the Chicago area and its environs or in Los Angeles or New York, I believe.

The Court: What about their argument that the continued tortious effect of the exposure in Illinois (p. 5) continued into the District of Columbia.

Mr. McMurtrie: Your Honor, I believe we would be governed by your ruling in 1976 in the Leaks versus Exlax case at 430 Fed Supp 413 that the tortious injury was in Chicago if he were exposed to a Celotex product or the asbestos fibers of a Celotex product in that area, but that any loss after that, as far as Celotex is concerned, forgetting Johns-Manville or any of the other 15 defendants who started in this case, was a pecuniary loss in the District of Columbia; but no further exposure in the District of Columbia and there is no affidavit supporting a further exposure by a Celotex product.

I think what we have here, Your Honor, is a time when these asbestos cases were first blooming in the District of Columbia, having happened in Norfolk and Philadelphia long before this, but there was a race to the courthouse by different law firms to gain control of a union. This case was inadequately prepared at that time to sufficiently identify the manufacturers of certain asbestos products.

We know, for example, that the decedent was exposed for a considerable period during World War II to asbestos products.

This court has already ruled in the Johns-Manville motion for summary judgment that although there is a (p. 6) suggestion of exposure in 1952 and 1953 to J. M. Plaster products, there is no affidavit to support that exposure by way of co-workers. And that is exactly the same situation as Celotex is in.

The Court: All right. Let me hear from the other side.

Mr. Nicholl: Thank you, Your Honor.

Your Honor, Peter Nicholl for the plaintiff, sir. Regarding our substantiation that there was an exposure to a Celotex product we do have Mr. Huff's letter which states that he was exposed to fire-bar during the period of time for the year ending, I believe, December 1971, 1971 being the year in question.

By virtue of attachments to Celotex's motion to change venue, those attachments being the purchasing records from the Carey Canadian Mine Company to Annard & Johnson, the employer in Chicago, we do have indications that this fire-bar product was indeed an asbestos product and that that ties in the fact that this fire-bar fireproofing was an asbestos product.

The Court: Let me see the Huff letter.

Where does it say it was done in the District of Columbia?

Mr. Nicholl: I did not say in the District of Columbia.

(p. 7) The Court: It had no contact with the District of Columbia.



Mr. McMurtrie (sic): I readily admit that there was no exposure to the Celotex products in the District of Columbia but that does not go to the question of the merits of the case for purposes of summary judgment. It may go to the question of changing venue, which is the other motion that Mr. McMurtie filed.

The Court: Was your client exposed to it in the in the District of Columbia?

Mr. Nicholl: No, sir, he was not. He was exposed to it in Chicago and I believe three or four other areas out west.

The Court: How can I entertain the action here and avoid granting their motion for summary judgment?

Mr. Nicholl: Summary judgment would go to the merits of the case by saying that we cannot prove exposure to their product. We can show exposure to their product.

The Court: What have you shown in opposition to their statement of material facts which are not in dispute?

Mr. Nicholl: We have opposed that, Your Honor, with our own in response to their motion.

The Court: You have what?

Mr. Nicholl: We have stated our own in response to their motion.

(p. 8) The Court: You don't state it was exposed here.

Mr. Nicholl: No, sir, we admit he was not exposed to their product in Washington. But again that would go

to a change of venue as opposed to summary judgment. In that regard - -

The Court: Would they be obliged to defend an action in this district?

Mr. Nicholl: They do business in the district. They readily admit that. Mrs. Catrett is still a resident of the district. Mr. Catrett was a resident of the district. Our winesses are nearby in Virginia. It would be, I think, dilatory to transfer it to Chicago, I submit, but on the other hand, it again does not go to the merits of the case.

The Court: It can't be tried here, you know that.

Mr. Nicholl: I don't know that. I think it would do an injustice to Mrs. Catrett to exchange or to transfer the case to Chicago when it has been in front of Your Honor for two years.

The Court: When it has been in front of me for two years?

Mr. Nicholl: In front of the court here for two years.

The Court: Not in front of this court.

Mr. Nicholl: That is right. It was previously in (p. 9) front of another judge.

The Court: What if we transfer it out to Chicago, you can't oppose that really, can you?

Mr. Nicholl: Your Honor, I can only oppose it on grounds that it would delay the matter, that it has already been approximately two years, that it would cause an inordinate cost to Mrs. Catrett being that she is a resident of the district, and we feel that it is her right to bring



her action here. She can proof exposure but not in the district, and I think that should be certainly sufficient for the Court here to maintain jurisdiction over the action. If there is any hardship - - Mr. McMurtrie doesn't really speak of any hardship that is going to accrue to him by keeping the case here.

The Court: He doesn't have to. All right. Anything else you want to say?

Mr. Nicholl: No, sir, Your Honor.

The Court: The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.

Let's have the Turner & Newall motion to dismiss for lack of jurisdiction, insufficiency of process or service of process.

* * *

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 80-2232

JUDGE RICHEY

MYRTLE NELL CATRETT
Administratrix of the
Estate of Louis H. Catrett

Plaintiff

v.

JOHNS-MANVILLE SALES CORP., et al

Defendants

ORDER

(Filed July 21, 1982)

Upon consideration of the Motion by Defendant Celotex Corporation for Summary Judgemnt (sic), and upon consideration of the entire record herein, it is by the Court this 21st day of July, 1982.

ORDERED that the Motion of Defendant Celotex Corporation for Summary Judgment is granted; and it is further

ORDERED that the Complaint is dismissed as to defendant Celotex Corporation with prejudice.

/s/ Judge Charles R. Richey

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 83-1694

MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, deceased, APPELLANT

v.

JOHNS-MANVILLE SALES CORPORATION, et al.

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Appeal from the United States District Court for the District of Columbia

(Civil Action No. 80-02232)

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Argued: February 6, 1984

Decided: March 8, 1985

*Peter T. Nicholl* with whom *James F. Green* and *Robert A. Taylor* were on the brief for appellant.

*H. Emslie Parks* for appellee, The Celotex Corporation.

*Charles E. Dorkey, III* was on the brief for appellee, Turner & Newall Ltd.

*Francis J. Ford* was on the brief for appellee, Armstrong World Industries, Inc.

Before: WALD, BORK and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* STARR.

Dissenting opinion filed by *Circuit Judge* BORK.

STARR, *Circuit Judge:* Appellant Myrtle Nell Catrett filed this wrongful death action in United States District Court in September 1980. Her complaint, sounding in negligence, breach of warranty, and strict liability, al-



leged that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by fifteen named corporations. During the proceedings below, two manufacturer-defendants filed motions challenging the District Court's *in personam* jurisdiction; the other thirteen corporate defendants filed motions for summary judgment. The District Court granted the various motions as to all defendants. Mrs. Catrett now appeals only from the District Court's grant of summary judgment to Celotex Corporation.[1]

After reviewing the record in this case, we are constrained to conclude that the District Court erred in granting summary judgment in favor of Celotex. Accordingly, we reverse and remand for further proceedings.

## I

The version of Celotex's moving papers on which summary judgment was granted was filed on December 23, 1981.[2] Celotex argued that summary judgment was proper because Mrs. Catrett had "failed to produce evidence that any [Celotex] product . . . was the proximate

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[1]Mrs. Catrett declined to challenge the dismissal of twelve of the other fourteen parties dismissed as defendants and, prior to oral argument in this court, discontinued her appeal from the dismissal of two parties, Armstrong World Industries and Turner & Newall, Ltd., pursuant to settlement agreements.

[2]Motion of Defendant Celotex Corp. for Summary Judgment (Motion for Summary Judgment), *reprinted in* Appellee's Supplemental Record Excerpts (S.R.E.) at 1sa. Celotex had filed, on September 28, 1981, an earlier motion for summary judgment, which it withdrew on November 9, 1981. *See* Docket Entries at 3-4, *reprinted in* Record Excerpts (R.E.) at 7a-8a.

cause of the injuries alleged within the jurisdictional limits of [the District] Court."[3] Celotex further contended that "[t]here is no evidence whatsoever that the defendant was ever exposed to any [Celotex] product containing asbestos . . . or that any such product was in any way the proximate cause of the decedent's death within the jurisdictional limits of [the District] Court." Statement of Material Facts as to Which There Is No Genuine Issue, *reprinted in* S.R.E. at 3sa-4sa.

In opposing this motion, Mrs. Catrett relied primarily on three documents which, she claimed, "demonstrate that there is a genuine material factual dispute"[4] as to whether Mr. Catrett had ever been exposed to Celotex asbestos products.[5] The documents were a copy of the transcript of her husband's July 17, 1979, deposition taken for use in proceedings in his earlier workman's compensation claim and two letters: one from William

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[3]Motion for Summary Judgment at 1, *reprinted in* S.R.E. at 1sa. While such an argument might be read as a basis for dismissal for lack of personal jurisdiction or for a change of venue, the motion was for summary judgment under Fed. R. Civ. P. 56(b). The District Court's grant of summary judgment must therefore have been based on its conclusion that there was "no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." Transcript of July 21, 1982 Proceedings at 9, *reprinted in* R.E. at 595a (emphasis added). The District Court's ruling was from the bench at the July 21, 1982 proceeding. No written opinion accompanied the ruling.

[4]Plaintiff's Memorandum of Points and Authorities in Opposition to Motion of Defendant Celotex Corporation for Summary Judgment (Plaintiff's Memorandum), *reprinted in* R.E. at 361a, 362a.

[5]For ease of reference, we use the term "Celotex products" to refer to those products manufactured by Celotex's predecessors in interest and to which Mr. Catrett was allegedly exposed.



O'Keefe, of Aetna Life & Casualty, to Mrs. Catrett's attorney and one from the Assistant Secretary of a Chicago enterprise, Anning & Johnson Co., to Aetna, both stating that Mr. Catrett had used a Celotex product during his employment with Anning & Johnson in Chicago in 1970-71. Mrs. Catrett argued unsuccessfully to the District Court that these three documents "evinced the essential link between [Celotex's] product and [Mr. Catrett], and it would be a question for the jury as to whether this was the proximate cause of the decedent's injuries and ultimate death."[6]

Celotex strenuously argues on appeal that plaintiff's evidence is infirm in that the three documents are hearsay and are inadmissible under any exception to the hearsay rule. Such inadmissible evidence, Celotex argues, may not be considered in opposition to a motion for summary judgment.

We need not, however, reach the evidentiary issue,[7] inasmuch as defendant's moving papers were patently defective on their face, rendering inappropriate the grant of summary judgment on the record as it stood before the District Court. Celotex offered *no* affidavits, declarations or evidence of any sort whatever in support of its

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[6]Plaintiff's Memorandum, *reprinted in* R.E. at 361a, 362a.

[7]Under our treatment of the case, we need not rule on the admissibility of the documents in question.

summary judgment motion. To the contrary, Celotex's motion was based solely on the plaintiff's purported failure to produce credible evidence to support her claim.[8] While Celotex may have faced difficulty, to be sure, in "proving the negative"[9] that plaintiff's decedent had not been exposed to its products, appellee made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion. As we will now see, that undisputed failure renders its motion fatally defective.

II

Rule 56(e) of the Federal Rules of Civil Procedure, as amended in 1963, could not be clearer that summary judgment under the circumstances before us will not lie. It provides:

> When a motion for summary judgment is made *and supported* as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

[8]Celotex also complained that Mrs. Catrett failed to answer interrogatories and product documents sought in discovery. Statement of Material Facts as to Which There Is No Genuine Issue, *reprinted in* S.R.E. at 3sa-4sa. However, Celotex did not seek sanctions, under Fed. R. Civ. P. 37, for failure to comply with discovery requests but instead sought summary judgment under Fed. R. Civ. P. 56(b). *See* Motion for Summary Judgment, *reprinted in* S.R.E. at 1sa.

[9]We are not faced with, and thus do not address, the situation where a manufacturer, sued by a remote user of its product, seeks to comply with Rule 56 but simply cannot "prove the negative" of non-use or non-exposure without reference to evidence in the hands of the plaintiff. Here, no effort whatever was made by Celotex to comply with the requirements of Rule 56, as we shall see in the text that follows.



Fed. R. Civ P. 56(e) (emphasis added). This rule unequivocally places a burden of coming forward with specific facts upon the party *opposing* a motion for summary judgment *only when* the proponent's motion is "made *and supported* as provided in th[e] rule." The Advisory Committee Note to Rule 56 explains that "[w]here the *evidentiary matter in support of the motion* does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Advisory Committee Note on 1963 Amendment to Fed. R. Civ. P. 56(e) (emphasis added). As the Supreme Court has clearly stated in this respect, "[b]oth the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159 (1970). It is firmly established that the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact.[10]

[10]*See, e.g., Adickes v. S. H. Kress & Co., supra,* 398 U.S. at 160; *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968); *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 172 (D.C. Cir. 1981) ("it is beyond cavil that a party opposing summary judgment is required to proffer rebuttal affidavits or other evidence 'only if its omission enables the movant to satisfy his burden of showing that no issue of material fact persists' "); *Weisberg v. United States Department of Justice*, 627 F.2d 365,

(Continued on following page)

At trial, of course, Mrs. Catrett would have the burden of proving by admissible evidence that her husband's exposure to Celotex's products had proximately caused his death. If Mrs. Catrett failed to satisfy her burden, then her case would be vulnerable to a motion for directed verdict. However, as this court has repeatedly held, the party moving for summary judgment carries the burden of proving the absence of a material issue of fact "even

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368 (D.C. Cir. 1980) ("It is equally settled in federal procedural law that '[t]he party seeking summary judgment has the burden of showing there is no genuine issue of material fact, even on issues where the other party would have the burden at trial, and even if the opponent presents no conflicting evidentiary matter.' "); *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979) (same); *National Association of Government Employees v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978) ("Facts not conclusively demonstrated, but essential to the movant's claim, are not established merely by his opponent's silence; rather, the movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue."); *United States v. General Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975) ("The party seeking summary judgment has the burden of showing there is no genuine issue of material fact . . . even if the opponent presents no conflicting evidentiary matter.") (footnotes omitted); *Bloomgarden v. Coyer*, 479 F.2d 201, 206-07 (D.C. Cir. 1973) ("The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue as to any material fact, and even if his opponent comes forward with nothing, summary judgment must be denied if the facts supporting the motion do not establish the nonexistence of such an issue."); *see also Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1222 (7th Cir. 1984) (defendant asbestos manufacturer did not meet its "burden of showing that no genuine issue of material fact exists in regard to plaintiff's alleged exposure . . . ; therefore plaintiff should not be penalized for failure to attach an affidavit to his response").



on issues where the other party would have the burden of proof at trial."[11]

In this case Celotex proffered nothing. It advanced only the naked allegation that the *plaintiff* had not come forward in discovery with evidence to support her allegations of the decedent's exposure to the defendant's product.[12] Under settled rules that barebones approach will not do. Mrs. Catrett was simply not required, given this state of the record, to offer any evidence in response.[13]

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[11] *United States v. General Motors Corp., supra*, 518 F.2d at 441; *see also Weisberg v. United States Department of Justice, supra*, 627 F.2d at 368 (quoting *Founding Church of Scientology v. National Security Agency, supra*, 610 F.2d at 836); *Founding Church of Scientology v. National Security Agency, supra*, 610 F. 2d at 836 (quoting *United States v. General Motors Corp., supra*, 518 F.2d at 441).

[12] That is not to say that Celotex was required to come forward with some specific form of submission. Indeed, Rule 56 is clear that there is no absolute requirement that the moving party furnish affidavits in support of its motion. But here, Celotex did not simply fail to submit affidavits or declarations in support of its motion; it came forward literally with nothing save for pointing to perceived shortfalls in the plaintiff's case.

It is in no wise unfair to Celotex to require it to support its case under Rule 56, even under the circumstances here. As we noted before, if a party has failed to comply with discovery requests, such as interrogatories and requests for production of documents, the Federal Rules provide an elaborately drawn system of sanctions for failures to comply, including the ultimate sanction of dismissal of one's case. Thus, our ruling in no manner leaves a party such as Celotex remediless in the face of unsuccessful efforts to effect discovery of the opposing side's case.

[13] Since Celotex offered no evidence, we need not and do not speculate as to what showing would have been adequate to meet Celotex's burden.

## III

Despite the clear state of the law relevant to the facts of this case, the dissent insists that the grant of summary judgment was proper. That position is based on both a misconception of the factual setting in which summary judgment was granted here and, more generally, on an overly broad reading of a legal proposition.

The dissent insists throughout that the plaintiff lacks any evidence as to causation and that, even accepting the plaintiff's factual allegations, judgment would have to be entered for the movant. Summary judgment was entered, the dissent emphasizes, because the trial judge found no showing of the plaintiff's decedent's exposure to Celotex in the District of Columbia or elsewhere.[14] Yet, the plaintiff had offered evidence on that very point. True, the evidence was not in admissible form, but at least some of the evidentiary infirmity was plainly curable. The point is that the plaintiff did have evidence, and if her allegations were accepted by the jury as true, the plaintiff, rather than the defendant, would have been entitled to judgment.

We fully recognize the unique vantage point of the District Courts to evaluate evidence and the reasonable discretion that District Judges rightly enjoy in granting summary judgment. We have no desire to cabin unduly that sound discretion, and our opinion should not have

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[14]See *supra* note 3 and accompanying text. We again note that the discussion at the time the motion was granted actually spoke to venue. It was only the phrase "or elsewhere," appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper.



that effect. Here, the bedrock fact is that the summary judgment motion was totally unsupported.[15] The issue on which we rule is therefore purely legal in nature, and our conclusion breaks no new ground whatever. The clear dictate of Rule 56[16] and a long, unbroken line of precedent[17] is that summary judgment is not proper absent a properly supported motion. This case is as simple as that.

The dissent, however, accuses us of failing to follow the law of this circuit, as expressed in *United States v. General Motors, supra,* and hornbook law that summary judgment and directed verdict are functionally equivalent. The charge is groundless. To be sure, *General Motors* states that a party seeking summary judgment "is entitled to the benefit of any relevant presumptions, and if the established facts and relevant presumptions would have entitled him to a directed verdict at trial, he is entitled to a summary judgment under Rule 56." *General Motors, supra,* 518 F.2d at 441-42. However, in *General Motors,* the movant had established certain facts, namely a significant number of failure in performance not attributable to wear or age of the automobile parts in question, and was given the benefit of the presumption that the failures occurred under specified use or reasonably anticipated abuse. *The equivalency of summary judgment and directed verdict was clearly premised in that case on the existence of this clear and sufficient support for the summary judgment motion.*

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[15]The dissent correctly notes that Rule 56 has no ironclad rule that a motion for summary judgment be supported in any particular manner. The motion does, however, require *some* support, and here support was totally lacking.

[16]See *supra* at 5-6.

[17]See *supra* note 10.

This equivalency breaks down only when an unsupported summary judgent (sic) motion is made by the party not having the burden of proof at trial. If this case had gone to trial and Mrs. Catrett had offered no admissible evidence in presenting her case, Celotex would plainly have been entitled to a directed verdict even without offering any evidence of its own. In that event, the plaintiff would already have enjoyed the opportunity to present her evidence, and the defendant could appropriately ground a motion simply on her failure to prove her case. Before trial, however, rather than arguing that the plaintiff has not proven her case, the movant for summary judgment argues that the plaintiff cannot prove her case. While Mrs. Catrett *has* not offered admissible evidence, the movant, and the court, are entitled to conclude that she *cannot* offer admissible evidence if but only if the movant has supported its motion in accordance with Rule 56. Again, the pivotal difference between this case and *General Motors* is that in the latter case the motion for summary judgment was supported. To argue that the equivalence between summary judgment and directed verdict in such a situation applies to this case as well as to ignore the statement in *General Motors* that "[t]he party seeking summary judgment has the burden of showing there is no genuine issue of material fact . . . even if the opponent presents no conflicting evidentiary matter."[18]

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[18]*General Motors, supra,* 518 F.2d at 441 (footnotes omitted). The dissent's cite to Wright, Miller & Kane provides no better support for its position. The treatise does note the similarity in the theories underlying summary judgment and directed verdict but also notes the movant's burden to *demonstate* that his opponent could not support a judgment in his favor at trial. *See* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2727 at 130 (1983).

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The dissent also argues that, since the court may under some circumstances grant summary judgment *sua sponte,* no requirement exists that the lack of a factual dispute be affirmatively demonstrated by the moving party. Support for this proposition is found in 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720 at 28. However, this salutary principle applies to the propriety of a grant of summary judgment when there was no motion for summary judgment before the court, not when there was no support for a summary judgment motion.[19]

Lastly, we respectfully take exception to the dissent's suggestion that we are creating a requirement that a

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Professor Moore's treatise also supports the position that the summary judgment directed verdict equivalency breaks down in the case at hand. While agreeing that the two procedures are akin, Moore's observes that their operations differ when the movant would not bear the burden at trial. 6 MOORE's FEDERAL PRACTICE ¶ 56.15[3] at 479-80 (1983). Furthermore, Moore's notes that the movant's papers "may in themselves be insufficient to discharge his burden; and in that event the opposing party need proffer no materials in opposition." *Id.* at 488 (footnote omitted). Such would not, of course, be the case with a directed verdict.

[19]Furthermore, the party against whom the judgment is to be entered must have sufficient advance notice. 10A Wright, Miller & Kane, *supra,* § 2720 at 34. The last minute objection to the evidence proffered by plaintiff, see Transcript of July 21, 1982, Proceedings 3-4, *reprinted in* R.E. 587a, 589a-90a, and the apparent reliance by the District Judge on what were actually venue concerns, *see supra* note 3, speak powerfully against that notice here.

plaintiff, having failed to support his or her case, should be allowed more time to produce admissible evidence. We are doing nothing of the sort. Had Celotex properly supported its summary judgment motion, we would agree that the inadmissibility of Mrs. Catrett's evidence would be fatal to her opposition to the motion. However, we refuse to hold the plaintiff—and the case law is abundantly clear that she should not be so held, *see supra* note 10—to a higher standard than the movant. Until Celotex properly supported its motion, Mrs. Catrett was not required to offer any evidence at all. We do not hold that she should have more time but simply that her time had not yet come.

IV

The District Court's grant of summary judgment in favor of Celotex Corporation is therefore reversed and the case remanded to the District Court for further proceedings.

*It is so ordered.*

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BORK, *Circuit Judge, dissenting*: The majority's decision in thi. case undermines the traditional authority of trial judges to grant summary judgment in meritless cases. Even though the plaintiff has *no* admissible evidence on an essential element of her case, the majority today allows her to survive a motion for summary judgment. This decision will probably lead to an unnecessary trial followed by a directed verdict for defendant Celotex. More generally, the precedent established today will waste trial court time and energy and unnecessarily add to the costs and procedural burdens faced by litigants.

The issue here is whether a trial judge may use summary judgment procedures to require a plaintiff, who has had ample time for discovery, to show that she has some admissible evidence to support an essential element of her case. The alternatives are that the defendant, which is the moving party, must prove a negative—that the plaintiff can never find evidence—or that the case go forward so that the plaintiff has still more time to cure her lack of evidence. The latter alternative apparently means that the plaintiff need never proffer evidence until she faces a motion for a directed verdict at trial. It seems to me better that summary judgment be awarded where, as here, the plaintiff has had two years for discovery and knew that she was expected to show her evidence in response to defendant's claim that she had none. The majority thinks otherwise.

In my view, the majority opinion rests on a flawed premise: that a district judge can never grant summary judgment, even in an obviously meritless case, unless a

party first makes a motion pursuant to Rule 56 and supports that motion with admissible evidence. The result in this case is that the plaintiff is granted an unsought extension of time to cure the defects in her proof. The premise being wrong, the result is gratuitous.

## I.

The majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute. The cases the majority cites hold only that a moving party has the burden of showing the absence of a material, factual dispute, even on issues where his opponent would have the burden of proof at trial. Maj. op. at 5 nn.10, 11. These cases do not consider the central question here: whether that showing must invariably be made with evidence.

It is important to keep in mind the distinction between a plaintiff's burden of proof on the merits and a defendant's burden of proof on summary judgment. The standards of proof by which each burden is satisfied are not necessarily the same. A plaintiff must prove his case by an affirmative, preponderance of the evidence. However, a defendant seeking summary judgment need only convince the trial judge that a reasonable jury could not find for the plaintiff, even if all disputed issues of fact and inferences were resolved in the plaintiff's flavor. There is no requirement that the trial judge must always become convinced of this by a positive evidentiary showing. Several principles of summary judgment law demonstrate that while a positive evidentiary showing will usually be necessary, it is not always required.



First, it is hornbook law and the law of this circuit that a trial judge should grant summary judgment if the plaintiff has so little evidence on an essential element of his claim that it is clear that a directed verdict would have to be granted at trial. 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2713.1, at 616 (1983); *United States* v. *General Motors Corp.*, 518 F.2d 420, 441-42 (D.C. Cir. 1975); *Dyer* v. *MacDougall*, 201 F.2d 265 (2d Cir. 1952) (L. Hand, J.). As Judge Leventhal has said, a party seeking summary judgment "is entitled to the benefit of any relevant presumptions, and if the established facts and relevant presumptions would have entitled him to a directed verdict at trial, he is entitled to a summary judgment under Rule 56." *General Motors*, 518 F.2d at 441-42. There is no point in sending a case to trial only to have the judge direct a verdict. In this case, a directed verdict would clearly be required since the plaintiff lacks any admissible evidence of causation, an essential element of her case.

In this respect, a motion for summary judgment is like a motion for a directed verdict. In neither is an evidentiary showing invariably required.[1] In both the moving party's burden is satisfied if he persuades the trial judge that his opponent must lose as a matter of law even

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[1] A directed verdict may be granted at the close of plaintiff's case even before defendant has introduced any evidence at all. This is appropriate when the plaintiff's case and the evidence supporting it are legally insufficient to support a favorable verdict. We have exactly this situation in this case at the summary judgment stage.

when all disputed facts and inferences are resolved in his opponent's favor.[2]

The analogy between summary judgment and directed verdicts has been emphasized by Wright & Miller.

> [I]t [is] clear that the movant may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent. If no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless and the movant therefore is entitled to judgment as a matter of law. In the sense the theory underlying summary judgment is similar to that of the directed verdict motion.

10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2727, at 130 (1983). Pursuant to these principles and to our decision in *General Motors,* 518 F.2d at 441-42, defendant Celotex is clearly entitled to summary judgment. Plaintiff's total lack of affirmative, admissible evidence of causation would result in a directed verdict at trial and should therefore warrant a grant of summary judgment now. The majority's refusal to uphold that grant represents a clear failure to follow *General Motors*[3]

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[2]This is not to suggest that the standards for granting summary judgments and directed verdicts are absolutely identical. Where competing inferences from the alleged facts are fairly possible, judges should be more charitable to non-moving parties on summary judgment especially until demeanor evidence can come out. *See, e.g.,* Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970). (Harlan, J.). However, where competing inferences are not possible and especially where there is a complete absence of proof, the standards governing summary judgment and directed verdicts largely coincide.

[3]It is true that in *General Motors* the party seeking summary judgment was only able to benefit from the relevant presumptions after it had established certain facts. In this case, however, it is not necessary for the defendant to establish any facts to benefit from the presumption that the plaintiff must prove causation. The need to establish facts in support of a summary judgment motion will depend on the nature of the presumptions at issue.



and overlooks this functional identity between summary judgment and directed verdicts.[4]

A second principle of law also shows that the majority has erred. Under some circumstances, trial judges may grant summary judgment *sua sponte so long as the losing* party was on notice that he had to come forward with all his evidence. 10A C. Wright, A. Miller & M. Kane, *supra,* § 2720, at 28. This rule clearly means that summary judgment does not require affirmative evidentiary proof of the absence of a factual dispute. Rather the trial judge need only notice this absence and demand that it be corrected. If it is not corrected after notice,[5] it becomes the trial judge's duty to grant summary judgment to conserve scarce judicial resources and avoid a useless trial. If the district court, on its own motion, may grant summary judgment whenever it concludes that required evidence cannot be produced, it necessarily follows that a defendant may ob-

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[4]The majority suggests that a passage in Moore's supports its position that the summary judgment directed verdict equivalency breaks down in the case at hand. 6 J. Moore, *Moore's Federal Practice* ¶ 56.15[3] (2d ed. 1972) (footnote omitted). I think this passage irrelevant to the present case because it clearly contemplates a situation where the plaintiff has at least a shred of evidence with which to go to trial. In that circumstance a moving defendant would have to produce contrary evidence to prove the absence of a triable, factual dispute. Here, however, the plaintiff has made no factual showing whatsoever. Accordingly, but for the unsought and indefinite extension of time the majority improperly grants the plaintiff, there would be no question but that the plaintiff could not possibly prevail.

[5]*See infra* Part II for a discussion of the adequacy of the notice given in this case.

tain summary judgment when it brings that situation to the court's attention.[6]

A third relevant legal principle is the substantial pretrial discretion trial judges enjoy to manage their caseloads. It is hard to see how that discretion is abused if a judge, at the defendant's request, asks a plaintiff to show that he has minimal evidence to support his case before he can go forward to trial. Indeed, district judges have broad pretrial authority to force the parties to narrow issues in order to reduce trial time by isolating the particular factual disputes that are to be tried. Fed. R. Civ. P. 16. This authority would be mocked if plaintiffs could not be obligated before trial to reveal that they had at least some evidence supporting the essential elements of their lawsuit.[7]

Finally, Rule 56 itself imposes no obligation on parties seeking summary judgment always to introduce positive evidence proving the absence of a factual dispute. Although the framers of the rule probably thought such

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[6]The majority agrees that a trial judge is empowered to grant summary judgment *sua sponte* when he concludes that a plaintiff has not produced any admissible evidence on an essential element of her claim. In this case, however, the majority finds the trial judge stripped of his power to act solely because the defendant Celotex filed an unsupported motion. I do not understand why this action by a party to the law suit diminishes the authority the trial judge would otherwise possess. I also do not understand why the majority continues to focus on Celotex's motion papers and does not focus instead on the absence here of a triable, factual dispute.

[7]It should be noted that Fed. R. Civ. P. 37 does make available various sanctions where a party improperly resists discovery. However, the availability of those sanctions does not also preclude a party from seeking summary judgment where the plaintiff has failed to fulfill his obligation to make out a prima facie case. The problem here is not resistance to discovery but inability to provide evidence.



evidence would be necessary in most case, *see* Advisory Committee Note to Rule 56, they imposed no ironclad requirement. Indeed, Rule 56 specifically allows for summary judgment on motion without a supporting affidavit. Fed. R. Civ. P. 56(b). This is appropriate in cases like the present one where even accepting the non-moving parties' factual allegations one must still enter judgment for the movant. *See, e.g., Chambers v. United States,* 357 F.2d 224, 227 (8th Cir. 1966); *Hubicki v. ACF Industries Inc.,* 484 F.2d 519, 522 (3d Cir. 1973); *Ramsey v. United States,* 329 F.2d 432 (9th Cir. 1964); *Reynolds v. Needle,* 132 F.2d 161, 162 (D.C. Cir. 1942); *Seago v. North Carolina Theatres, Inc.,* 42 F.R.D. 627 (4th Cir.), *aff'd,* 388 F.2d 987 (1966). Here as in *Chambers* "no factual dispute exists and the complaint [absent evidence of causation] does not state a cause of action." 357 F.2d at 227.

Since this case lacks a *triable,* factual dispute, even if Celotex were to stipulate to the truthfulness of all of Mrs. Catrett's admissible evidence, Celotex would still prevail as a matter of law. The majority believes there is a triable, factual dispute in this case solely because Mrs. Catrett alleged causation in her complaint. Bare allegations in a complaint are not admissible at trial, however, and would not support a jury verdict for Mrs. Catrett.[8]

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[8]It is, of course, conceivable that on remand Mrs. Catrett will eventually find admissible evidence of causation and possibly even prevail at trial. This would not in any way change my conclusion that we should affirm the grant of summary judgment before us now. It is settled law that courts should not allow a party to get to trial merely in the hope that he will obtain evidence at that time. 10A C. Wright, *supra,* § 2727, at 163.

Rather than properly focussing its inquiry on whether a triable, factual dispute exists in this case, the majority has become entangled in the interplay between the defendant's burden of proof on the summary judgment motion and the plaintiff's burden of persuasion in this lawsuit, which she retains at all times. The majority has required the defendant to prove in effect the negative of the plaintiff's case, even though the plaintiff has no evidence on an essential element of her claim. This temporarily switches the plaintiff's burden of persuasion in the lawsuit to the defendant which now must prove that it could not conceivably have caused the plaintiff's injury. The majority should have required the defendant only to persuade the trial judge that there is no triable, factual dispute on causation.[9]

I agree with the majority that in most cases defendants will only be able to establish the absence of a factual dispute by producing positive evidence that undermines the plaintiff's factual showing. So long as the plaintiff has even one iota of weak inferential evidence, defendants will have the burden of affirmatively attacking that evidence to prove that there is no factual dispute suitable for trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 160. Here, however, the plaintiff has made no factual showing

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[9]The majority cites Fed. R. Civ. P. 56(e) as support for its view. This provision does indicate that when a motion for summary judgment is made and supported by affidavits it must be answered with rebutting affidavits. Clearly, Mrs. Catrett need not produce rebutting affidavits since Celotex has not produced any affidavits in support of its motion. Nonetheless, Mrs. Catrett is still obligated to produce some admissible evidence supporting the essential elements of her case. I do not see why she should be able to get to trial just because she was not obligated to produce rebutting evidence under Rule 56(e).



whatsoever. Accordingly, there can be do doubt as to the absence of a triable, factual dispute in this case.

II.

The majority also objects to the grant of summary judgment in this case on the ground that Plaintiff Catrett should be given an additional opportunity to produce admissible evidence on causation. I disagree. This case is just like one in which, after discovery, the judge holds a pre-trial conference, asks the plaintiff how he intends to prove each element of his case, and learns that the plaintiff has no admissible evidence of an indispensable element of that case. That case would be ripe for disposition by summary judgment. Here, Mrs. Catrett has had almost two years to prepare her case for trial. The motion for summary judgment put her on notice that Celotex claimed she had no evidence of causation. Mrs. Catrett was represented by counsel who were certainly aware that the district judge could consider only admissible evidence in determining the existence of a triable, factual dispute.[10] 6 J. Moore, *Moore's Federal Practice* ¶ 56-11[1-8] (2d ed. 1972); *Government of Republic of China v. Compass Communications Corp.*, 473 F. Supp. 1306 (D.D.C. 1979).

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[10]In a departure from the established rules, the majority suggests that the district judge could consider inadmissible evidence of causation because the admissibility problems with the evidence might eventually be cured. This holding destroys any incentive that parties now face to put evidence into admissible form prior to trial, and diminishes the utility of pre-trial efforts to narrow and isolate the factual issues that are to be tried. The majority's holding will inevitably lead to pointless trials where anticipated factual disputes fail to materialize because *admissible* evidence cannot be found. The majority's innovation on this point will substantially undermine the utility of summary judgment procedures while yielding no concomitant benefits.

Any trained attorney should have known that what was offered was inadmissible. Counsel not only failed to produce any admissible evidence of causation but failed at the summary judgment hearing to seek additional time to produce such evidence. Under these circumstances, the district judge clearly acted within his discretion in granting summary judgment without giving Mrs. Catrett an additional, *unrequested* opportunity to produce admissible evidence essential to her case. As appellate judges, we should leave the district court substantial discretion to manage the litigation before it. That discretion includes the discretion to determine when a summary judgment is ripe.

It would have been better if the majority reached the result it does by holding that plaintiff should have been given a new deadline to produce admissible evidence of causation. That would, for the reasons just given, be wrong, but at least it would not damage the utility of Rule 56. I understand the judicial impulse to save a plaintiff's case from what may have been careless preparation, but the deformation of summary judgment procedures is too high a price to pay for the gratification of that impulse.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

NO. 83-1694

Myrtle Nell Catrett, Administratix of the Estate of Louis H. Catrett, Deceased

v.

Johns-Manville Sales Corporation, et al.

BEFORE : Wald, Bork and Starr, Circuit Judges

O R D E R

(Filed May 7, 1985)

Upon consideration of appellee's petition for rehearing, filed April 5, 1985, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

FOR THE COURT
GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
Chief Deputy Clerk

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

NO. 83-1694

Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, Deceased

v.

Johns-Manville Sales Corporation, et al.

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

(Filed May 7, 1985)

Appellee's suggestion for rehearing *en banc,* filed April 5, 1985, has been circulated to the full Court. A majority of the judges in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

*Per Curiam*

FOR THE COURT
GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Ginsburg, Bork and Scalia would grant the suggestion.

Circuit Judge Mikva did not participate in this order.

# PETITIONER'S

# BRIEF

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-198

In The
# Supreme Court of the United States
October Term, 1985

THE CELOTEX CORPORATION,
*Petitioner,*

v.

MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. Whether the moving party, on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, must support its motion with some affirmative evidence even though the opposing party will have the burden of proof at trial and has no evidence with which to support its claim.

2. Whether Rule 56 of the Federal Rules of Civil Procedure permits a party to oppose a motion for summary judgement with inadmissible evidence.

## PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit (No. 83-1694) were Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, Deceased, and The Celotex Corporation, a wholly-owned subsidiary of Jim Walter Corporation. which is traded on the New York Stock Exchange.

Armstrong World Industries, Inc. (formerly Armstrong Cork Company) and Turner & Newall, Ltd. were originally parties to the appeal from the United States District Court, but settled prior to oral argument before the United States Court of Appeals, and have no interest in the outcome of this matter.



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No. 85-198

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In The

# Supreme Court of the United States

October Term, 1985

—o—

THE CELOTEX CORPORATION,

*Petitioner,*

v.

MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased,

*Respondent.*

—o—

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

—o—

## BRIEF FOR PETITIONER

—o—

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 756 F.2d 181, as *Catrett v. Johns-Manville Sales Corp.*, and is reproduced at page 220 of the Joint Appendix (J.A. 220). The District Court did not file a written opinion, but entered an Order granting Celotex's Motion for Summary Judgment, which Order is reproduced at page 218 of the

Joint Appendix (J.A. 218). The transcript of the hearing on Celotex's Motion for Summary Judgment is reproduced in pertinent part at page 210 of the Joint Appendix (J.A. 210-217) and is reproduced in full as Appendix B to the Petition For A Writ of Certiorari (Pet. App. 23a).

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## JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1985. On May 7, 1985, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing *En Banc* filed by Petitioner (J.A. 243). Petitioner filed its Petition for Writ of Certiorari on August 5, 1985. The Petition was granted by order of this Court on November 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

—o—

## STATUTORY PROVISIONS AND RULES INVOLVED

This case involves Rules 1 and 56 of the Federal Rules of Civil Procedure. The text of Rule 56 is set forth as Appendix F to the Petition for A Writ of Certiorari (Pet. App. 48a). The text of Rule 1 is set forth below:

> Rule 1. Scope of Rules. These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

—o—



## STATEMENT OF THE CASE

### A. Proceedings In The United States District Court.

On September 2, 1980, Myrtle Catrett, widow of Louis H. Catrett and Administratrix of his estate, filed a wrongful death and survival action in the United States District Court for the District of Columbia against fifteen corporate defendants, including Celotex. The complaint was based on negligence, breach of warranty, and strict liability.

Mrs. Catrett alleged that as a result of Louis Catrett's exposure, during his career as an asbestos insulator, to products containing asbestos manufacturer or distributed by the defendants, Louis Catrett contract malignant peritoneal mesothelioma and died on September 3, 1979.

On October 17, 1980, Celotex filed a Request for Production of Documents which included a request for any documents in the possession or control of plaintiff relating to the identification of asbestos-containing products with which the decedent worked (J.A. 21). No such documents were ever produced.

On February 13, 1981, the defendants filed a joint set of interrogatories to the Plaintiff. Interrogatory No. 51 requested specific information concerning decedent's asbestos exposure, including the "type and identity of each such asbestos material with which your husband had contact, including the trade or brand name and manufacturer if known. . . ." On June 29, 1981, Plaintiff answered these interrogatories, but with respect to Interrogatory No. 51 stated only that "Plaintiff will attempt to supply answers to Interrogaotry [sic] No. 51 in Plaintiff's Supplemental Answers to Plaintiff's [sic] Interrogatories." (J.A. 60).

On July 27, 1981, the defendants filed a joint motion to compel further answers to interrogatories, specifically including Interrogatory No. 51 (J.A. 64). Plaintiff did not file supplemental answers to interrogatories until February 1, 1982—after the filing of Celotex's Motion for Summary Judgment (J.A. 200-203) . The answer to Interrogatory No. 51 was never supplemented, nor did plaintiff otherwise identify any exposure to Celotex products in any of her discovery materials.

On September 28, 1981, Celotex filed a Motion for Summary Judgment, including a Statement of Material Facts and Memorandum of Points and Authorities (J.A. 73). Celotex withdrew its Motion for Summary Judgment on November 9, 1981, (J.A. 167), and subsequently refiled its Motion for Summary Judgment, including a Statement of Material Facts and a Memorandum of Points and Authorities, on December 23, 1981 (J.A. 170).

The basis for Celotex's motion was that Mrs. Catrett had failed to produce evidence that any Celotex product was the proximate cause of Louis Catrett's death and that Mrs. Catrett could not show that Mr. Catrett had been exposed to Celotex's products within the jurisdictional limits of the district court or elsewhere. Celotex pointed to Mrs. Catrett's failure to identify Celotex's products in her answers to the joint interrogatories from all defendants to plaintiff, and to Mrs. Catrett's failure to respond to Celotex's supplemental interrogatories, as the basis for its contention that plaintiff could not prove that Mr. Catrett had been exposed to Celotex's products.

Mrs. Catrett responded on January 4, 1982 by filing a Motion and Memorandum in opposition to Celotex's Motion for Summary Judgment (J.A. 181). In her response, Mrs. Catrett produced, for the first time, three documents which she contended could be used to establish Mr. Catrett's exposure to Celotex's products. The documents were (1) a letter to Mr. Catrett's attorney from a Claim Representative at Aetna Casualty and Surety Company (J.A. 160); (2) a letter from one of Mr. Catrett's employers to a Claim Representative at Aetna Casualty and Surety Company (J.A. 162); and (3) deposition testimony of Mr. Catrett, taken in his workmen's compensation proceeding (J.A. 164).



Celotex was not a party to the proceeding in which Mr. Catrett's testimony was taken and had no opportunity to be present or to cross-examine Mr. Catrett at that proceeding. Plaintiff conceded that this testimony would not be admissible against Celotex at trial. The two letters proffered in opposition to Celotex's Motion for Summary Judgment did not purport to be based on personal knowledge. Perhaps just as importantly, they state that the products in question were manufactured by "Carey-Canada, Inc. and Carey-Canadian Asbestos" which, they state, "is now owned by" the Celotex Corporation. There was no suggestion that Celotex, the defendant in the instant case, was liable for the torts of either Carey Canada Inc. or Carey-Canadian Asbestos, nor was there any proffer of facts which would justify such a "piercing of the corporate veil."[1]

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[1] Carey Canada Inc. is an independent, wholly-owned subsidiary of Celotex. Celotex has never, in any of the thousands of asbestos cases which have been filed against it, been held liable for the torts of Carey Canada Inc., or Carey-Canadian Mines.

On July 21, 1982, the District Court, ruling from the bench, granted Celotex's Motion for Summary Judgment and held that there was no showing that Mr. Catrett had been exposed to Celotex's products in the District of Columbia or elsewhere (J.A. 217).

On June 16, 1983, Mrs. Catrett filed a Notice of Appeal with the Clerk of the United States District Court for the District of Columbia, appealing the Orders granting summary judgment in favor of Celotex and Armstrong World Industries, Inc.

Mrs. Catrett did not challenge the dismissal of the other twelve Defendants, and settled with Armstrong World Industries, Inc. and Turner & Newall, Ltd. prior to the oral argument on appeal.

**B. The Decision In The Court Of Appeals.**

On appeal, the District of Columbia Circuit reversed, holding that Celotex's "moving papers were patently defective on their face, rendering inappropriate the grant of summary judgment on the record as it stood before the District Court." *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985) (J.A. at 223). Thus, the Court stated that it did not need to reach the evidentiary issue.

The Court determined that Celotex merely pointed to Mrs. Catrett's inability to produce evidence to support her claim, and that Celotex offered no affidavits, declarations or evidence of any sort to supports its motion. Thus, the Court held that Mrs. Catrett need not come forward with evidence to oppose Celotex's motion.

In support of its position, the majority relied upon "a long, unbroken line of precedent," 756 F.2d at 186, (J.A.



229), holding that summary judgment is not proper absent a properly supported motion. However, the Court expressly failed to state what showing would have been adequate to meet Celotex's burden. *Id.* at 185, n. 13 (J.A. 227).

Judge Bork, dissenting, would have affirmed Celotex's summary judgment, under several principles of summary judgment law. First, he argued by analogy to a motion for directed verdict, that since Mrs. Catrett could not survive directed verdict at trial, then summary judgment is proper. Additionally, since a trial judge can grant summary judgment *sua sponte* whenever it concludes that required evidence cannot be produced, then a party can obtain summary judgment whenever it brings that situation to the Court's attention. Further, the dissent noted that it is within a trial court's discretion to grant summary judgment where a party cannot show that he has at least minimal evidence to support a case, and "this authority would be mocked if plaintiffs could not be obligated before trial to reveal that they had at least some evidence supporting the essential elements of their lawsuit." *Id.* at 190 (J.A. 238).

Finally, the dissent pointed out that Rule 56 imposes no ironclad requirements, and, in fact, Rule 56(b) allows for summary judgment on motion without a supporting affidavit. *Id.* (J.A. 239).

In his conclusion, Judge Bork stated "I understand the judicial impulse to save a plaintiff's case from what may have been careless preparation, but the deformation of summary judgment procedures is too high a price to pay for the gratification of that impulse." *Id.* at 191 (J.A. 242).

On May 7, 1985, the District of Columbia Circuit denied a Petition for Rehearing (J.A. 243), and Suggestion for Rehearing *En Banc* (J.A. 244).

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## SUMMARY OF ARGUMENT

A. The majority below erred in requiring that Celotex affirmatively prove that plaintiff's decedent was never exposed to Celotex products. Plaintiff did not have any admissible evidence with which to prove any liability on the part of Celotex and did not request an extension of time to cure any deficiencies in her proof. Unless Celotex were able to account for every day of the working life of plaintiff's decedent, it would be a logical impossibility for Celotex to prove that plaintiff's decedent was never exposed to any of its products.

Celotex, in conjunction with the other defendants, had requested that plaintiff set forth the details of exposure to the asbestos-containing products of the various defendants (J.A. 59-60). Despite the fact that summary judgment was not entered until more than twenty-two months after plaintiff's suit was filed, plaintiff's discovery responses never indicated that plaintiff had any evidence that decedent was ever exposed to Celotex products at any time during his career.

When Celotex filed its summary judgment motion based upon plantiff's failure to produce any evidence to support her case, plaintiff responded with evidence which would clearly be insufficient to go to the jury. The District Court's granting of Celotex's summary judgment



motion was entirely consistent with the mandate of Rule 1 of the Federal Rules of Civil Procedure that the Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." As Judge Bork's dissent stated, the majority's holding "undermines the traditional authority of trial judges to grant summary judgment in meritless cases" and "will waste trial court time and energy and unnecessarily add to the costs and procedural burdens faced by litigants."

B. In denying Celotex's Motion for Summary Judgment, the majority below erred in relying, in part, upon inadmissible evidence proffered by Plaintiff in her opposition to Celotex's Motion. Although the majority at one point stated that it did not reach the evidentiary issues relating to plaintiff's opposition to Celotex's Motion for Summary Judgment, (J.A. 223), it also conceded that "the evidence was not in admissible form . . . ." (J.A. 228). The majority nevertheless considered this evidence and stated that "the plaintiff did have evidence, and if her allegations were accepted by the jury as true, the plaintiff, rather than the defendant, would have been entitled to judgment." *Id.*

What the majority ignored is that, in order to get to the jury, the plaintiff would need to introduce *admissible* evidence of support to Celotex products. Since the majority recognized that the plaintiff had not been able to discover such evidence during almost two years of litigation—and since the plaintiff did not request additional time for further discovery—there was no justifiable reason to deny Celotex's summary judgment motion and further prolong the litigation.

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## ARGUMENT

### I. The Majority Below Applied An Incorrect Standard In Deciding Whether Celotex Had Satisfied Its Initial Burden In Moving For Summary Judgment.

Rule 1 of the Federal Rules of Civil Procedure provides that those Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." As Judge Bork pointed out in his dissent, the holding of the majority below will produce precisely the opposite result. The majority's decision will add considerably to the congestion of our overburdened judicial system. In the context of asbestos litigation alone, this burden is overwhelming. As of early 1984, there were approximately 7,000 asbestos cases representing nearly 13,000 claimants pending in the federal courts. T. Willging, *Asbestos Case Management: Pretrial and Trial Procedures* (Federal Judicial Center 1985), 10-11.

It has long been recognized that summary judgment is an appropriate tool for avoiding the pointless expense of trials in which plaintiffs will not be able to sustain their burden of proof. This Court emphasized the importance of this aspect of summary judgment practice in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), when it pointed out that the defendant's burden under Rule 56 was satisfied when the defendant demonstrated "that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them." *Id.* at 289.

In the present case, Celotex demonstrated, in the only way possible, that plaintiff would not be able to support



her allegations because she had no admissible evidence to support them. Just as the burden of proof standard which the plaintiff in *First National Bank* suggested the defendant had to meet in order to justify a summary judgment suggested "that Rule 56(e) should, in effect, be read out of antitrust cases . . . ," 391 U.S. at 289, the standard adopted by the majority below would effectively eliminate Rule 56 from product liability cases. The following policy considerations, which this Court adopted in *First National Bank,* are as applicable to products liability cases as they are to antitrust cases such as the one which was then before the Court:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

*Id.* at 290.

Numerous cases in the lower courts have recognized that where a party having the burden of proof at trial has no admissible evidence which will permit that burden to be met at trial, further litigation would be pointless and summary judgment should be granted. For example, in *Wade v. New York Telephone Co.*, 500 F.Supp. 1170, 1177 (S.D. N.Y. 1980), the rule was stated as follows:

> A movant for summary judgment may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for the opponent. If no evidence could be mustered to sustain the nonmoving party's position, a trial would be futile, and the movant therefore is entitled to judgment as a matter of law.

Similarly, in *State of Illinois v. Climatemp, Inc.*, 91 F.R.D. 252, 254 (N.D. Ill. 1981), it was stated that the defendant met its Rule 56 burden by demonstrating "that no evidence exists which would support a judgment for plaintiffs if the case was to go to trial." In *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975), it was pointed out that where plaintiffs have not been able to produce evidence to support their claims after an opportunity for discovery, there is no issue for trial and summary judgment "cannot be defeated by the vague hope that something may turn up at trial." *Id.* at 110, *quoting Perma Research and Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969).

The rule has frequently been stated that summary judgment is justified where the evidence before the court would require a directed verdict if presented at trial. *See, e.g., Chambers v. United States*, 357 F.2d 224, 227 (8th Cir. 1966); *Lundeen v. Cordner*, 354 F.2d 401, 407 (8th Cir. 1966); *Wetzell v. Eaton Corp.*, 62 F.R.D. 22 (D. Minn. 1973). Plaintiff lacks personal knowledge of any facts which would support a verdict against Celotex, and her inability to develop any admissible evidence through discovery, is comparable to the lack of evidence to support the allegations of plaintiff's complaint which was held to justify a summary judgment in *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969). If the summary judgment rule is to have any utility in eliminating pointless litigation, then a party who has the burden of proof on an issue at trial must be required, in order to defeat a summary judgment motion "to show that he can



produce evidence at the trial . . .," rather than obtain a denial of the motion "upon the unsubstantiated hope that he can produce such evidence at the trial." *Id.* at 643.

In *Blackstone v. Shook and Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985), *Odum v. Celotex Corp.*, 764 F.2d 1486 (11th Cir. 1985), and *Lee v. Celotex Corporation*, 764 F.2d 1489 (11th Cir. 1985), the Court of Appeals for the Eleventh Circuit thoroughly discussed the application of Rule 56 to asbestos litigation. In any tort case, the threshold issue is whether any conduct of the defendant caused or contributed to the plaintiff's injuries. As the Eleventh Circuit pointed out in *Lee, supra,* this means that the plaintiff "must produce sufficient evidence to support a finding that plaintiff was directly exposed to that defendant's asbestos-containing products." *Id.* at 1490. In *Lee,* the court held that the defendant met its burden under Rule 56 by showing that the only evidence which plaintiff had proffered on exposure was "based on speculation and conjecture." *Id.* at 1491. The majority below seems to construe Rule 56 as requiring that Celotex affirmatively demonstrate that plaintiff's decedent was never exposed to Celotex products. It is of course impossible for any defendant in the position of Celotex to provide such proof—which would logically require an accounting of each day of decedent's career. To require that a defendant meet an impossible burden of proof in order to obtain a summary judgment is of course to make summary judgment unavailable as a practical matter. The inevitable effect will be to permit plaintiffs to require that defendants go through the expense of a trial in order to obtain a directed verdict. There is nothing in Rule 56 which requires the majority's conclusion. Moreover, such a construction of Rule 56

could hardly be *less* designed to secure "the just, speedy, and inexpensive determination of every action," as is mandated by Rule 1 of the Federal Rules of Civil Procedure.

The majority below contended that reversal of the summary judgment was required by the holding of this Court in *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970). In fact, however, the posture of the litigation in *Adickes* was in no respect comparable to that of the present case. In *Adickes,* the plaintiff had been denied service because she was part of an interracial group. The plaintiff alleged that this refusal resulted, at least in part, from a conspiracy between the police department and the store personnel and that a policeman had signalled to the store manager that she should be denied service. Although plaintiff concededly had no *direct* evidence of such a signal, there was circumstantial evidence to support her theory. *See,* 398 U.S. at 156, nn. 9, 13 & 14. Not only did the plaintiff have some circumstantial evidence to support her theory, but the material which the defense offered in support of its Motion for Summary Judgment was inconsistent in some important respects—including a disagreement between the store manager and the police chief about whether they even knew each other. *Id.* nn. 8 & 11.

In a situation such as that in *Adickes,* the demeanor of the witnesses is obviously a crucial factor. Moreover, the defendant is in a much better position than the plaintiff to fully develop the facts. Since demeanor evidence cannot be evaluated at the summary judgment stage and since there was some circumstantial evidence to support



the plaintiff's theory[2], summary judgment was not appropriate. It could hardly be considered pure speculation for a jury to conclude that the refusal of service was probably related to the presence of the police officer, particularly in view of the circumstances which existed in Mississippi in 1964. In the present case, however, unlike in *Adickes,* the plaintiff has produced ***no admissible evidence whatsoever***—either direct or circumstantial—to support allegations against Celotex. The holding of this Court in *Adickes* in no way requires the result reached by the majority below.

The extremely restrictive view of the availability of summary judgment which was adopted by the District of Columbia Circuit in the present case seriously compromises the effectiveness of this important procedural tool. The District of Columbia Circuit itself pointed out in *Washington Post Company v. Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. den.* 385 U.S. 1011, that:

> Summary judgment serves important functions which would be left undone if courts to restrictively viewed their power. Chief among these are avoidance

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[2] Specifically, there was evidence from which a jury could have found as follows: A policeman entered the store while an interracial group was waiting for service. After watching the group for a period of time, the officer went to the back of the store where he could not be seen, was out of sight for several minutes, and then left the store. Shortly thereafter, the store manager came to the front of the store and, by means of a signal which he had admittedly prearranged with one of his employees, indicated that the group should not be served. Upon leaving the store, the members of the group were immediately arrested by the same police officer who had been in the store. Finally, the affidavit submitted by the police officer did not deny he was in the store or that he communicated to some store employee his disapproval of serving the group. 398 U.S. at 158.

of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement.

In *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972) the Seventh Circuit discussed the importance of appellate courts avoiding an overly restrictive construction of Rule 56, and the appropriate standard for appellate review of granted summary judgment motions:

> If the pleadings and proof in the form of depositions, affidavits and admissions on file disclose that no real cause of action or defense exists, the court may determine there is no issue to be tried and may grant a summary judgment. In reaching its determination the court has the power to penetrate the allegations of fact in the pleadings and look at any evidential source to determine whether there is an issue of fact to be tried. Parmelee Transportation Company v. Keeshin, 292 F.2d 794 (7 Cir. 1961). The primary purpose of a Motion for Summary Judgment is to avoid a useless trial, and summary judgment is a procedural device for promptly disposing of actions in which there is no genuine issue of any material fact even though such issue might have been raised by formal pleadings. The very purpose of Rule 56 is to eliminate a trial in such cases where a trial is unnecessary and results in delay and expense. Appellate courts should not look the other way to ignore the existence of the genuine issues of material facts, but neither should they strain to find the existence of such genuine issues where none exist. Kirk v. Home Indemnity Company, 431 F.2d 554 (7 Cir. 1970).

The majority opinion below fails to acknowledge any difference between a Motion for Summary Judgment filed by a party who *does not* have the ultimate burden of proof on an issue and a summary judgment motion filed by a party who *does* have the burden of proof at trial. This Court has never specifically addressed the issue of whether there is a difference in the burden placed upon the moving



party in the above two situations. However, the policy considerations discussed in *First National Bank of Arizona, supra,* and the guidelines set forth in Rule 1 of the Federal Rules of Civil Procedure strongly support the application of a less stringent standard by a court in its review of the papers of a party which is moving for summary judgment on an issue upon which the opposing party will have the burden of proof at trial.

The question of the standard to be applied on a motion for summary judgment filed by a defending party was addressed in *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F.Supp. 1100, 1143 (E. D. Pa. 1981), in which the trial court specifically held that the burden of proving that there is significant probative evidence with which to support the plaintiff's claim is upon the plaintiff and that if the plaintiff cannot discharge this burden, summary judgment should be granted. This view was affirmed by the Third Circuit in *In re Japanese Electronics Products,* 723 F.2d 238, 258 (3d Cir. 1983), in which the appellate court affirmed the summary judgment and stated that the movant "may chose not to submit any evidentiary materials supporting his summary judgment motion."

The academic commentators are virtually unanimous in the view that the burden of proof at trial should be reflected in the standard used to judge the adequacy of the papers filed in support of a Motion for Summary Judgment. Moreover, summary judgment practice in a number of states having rules essentially identical to Rule 56 recognizes a difference in the burden placed upon the moving party depending upon which party will have the burden of proof on a particular issue at trial.

One academic commentator has cogently argued that where a Motion for Summary Judgment is made by a party who will not have the burden of proof on the issue at trial, the motion, "without more [should put] an opposing party with the burden of proof to the task of producing evidence sufficient to sustain a favorable verdict." Currie, *Thoughts on Directed Verdicts and Summary Judgments,* 45 U. Chi. L. Rev. 72, 79 (1977).

Another commentator suggests that only a minimal showing should be required of a movant who will not have the burden of proof at trial. Professor Louis, in *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 Yale L. J. 745 (1974), has strongly urged recognition of a difference in the initial burden placed upon the moving party depending upon which side has the ultimate burden of proof:

> The primary function of summary judgment is to intercept factually deficient claims and defenses in advance of trial. But the present procedure is unsatisfactory in that it fails to differentiate between movants who would have the trial proof burden and those who would not. A better approach would be to harmonize the initial summary judgment evidentiary burden with the burden of proof at trial. While movants with the trial burden should be held to a strict standard, movants not having that burden should be able to sustain their initial evidentiary burden by a prima facie showing.

*Id.* at 769.

Professor Louis suggests that one method by which a party without the burden of proof at trial could justify a summary judgment would be, through discovery, to "obtain a preview of his opponent's evidence on an essential element and contend, in support of his motion, that the evidence is insufficient to discharge his opponent's production



burden." *Id.* at 750. As Professor Louis discusses, the modern practice of "notice pleading" under the Federal Rules of Civil Procedure makes it particularly important to construe Rule 56 in a manner which permits its use to weed out cases in which the party with the burden of proof lacks evidence which is essential to the proof of his claim:

> The task of intercepting factually insufficient claims or defenses has been taken from the motion to dismiss—the successor to the demurrer—and given to the Motion for Summary Judgment. A conclusory, factually deficient pleading will usually survive a motion to dismiss. If the party moving for summary judgment must discharge a rigorous proof burden regardless of whether he would bear the burden of proof at trial, he could almost never compel the pleader to demonstrate that he can prove the essential elements which he was in the past required to allege in detail. As a result the movant could rarely intercept a factually deficient claim or defense. Given the severe congestion of most court dockets, such an interpretation of the Federal Rules of Civil Procedure is most unfortunate.

*Id.* at 752 (footnotes omitted).

The concept of a "forecast" or "preview" of the evidence as the means of deciding whether the movant has initially justified the Motion for Summary Judgment has been specifically endorsed by, among others, the Supreme Court of North Carolina in *Caldwell v. Deese,* 288 N.C. 375, 218 S.E. 2d 379 (1975).

Summary judgment practice in Minnesota similarly recognizes a difference in the initial showing required of a movant depending upon which party will have the burden of proof at trial. In Pielemeier, *Summary Judgment in Minnesota: A Search For Patterns,* 7 Wm. Mitchell L. Rev. 147 (1981), the author analyzes reported decisions granting or denying summary judgment according to

whether or not the movant will have the burden of proof at trial. Where the movant is the party which will have the burden of proof, summary judgment is frequently denied upon the basis of insufficiency of the moving papers. Where, however, the motion is made by the party who will *not* have the burden of proof on the issue, summary judgment is consistently granted unless the party opposing the motion can demonstrate that it will be able to produce sufficient evidence to defeat a motion for directed verdict. Professor Pielemeier suggests that a failure to demonstrate that admissible evidence exists with which to support a claim should be regarded as an *admission of the nonexistence of such evidence* and should justify summary judgment:

> The logical result of this analysis is that courts should be more inclined toward imposing a less strict standard of proof when a summary judgment motion is made by one seeking to negate the existence of a fact essential to his opponent's case. The party opposing the motion, who will have the burden of establishing that fact at trial, should be required to offer tangible evidence of his ability to eventually sustain the burden of proof after the moving party has submitted evidence *suggesting* the contrary. Generally the party with the burden of proof will be more likely to have knowledge of the location of witnesses, if any, who could supply affidavits supporting the existence of necessary facts. Even if this is not the case, the party opposing the motion would eventually be required to use discovery to obtain this necessary evidence. If that party is either unwilling or unable to obtain the evidence at the summary judgment stage, there is no point in allowing the litigation to proceed through a needless trial to a directed verdict. Fairness demands that trials of other litigants not be delayed by frivolous matters and that the moving party not be subjected to the time and expense of litigating a nonmeritorious claim or defense.

*Id.* at 158-59 (Emphasis added) (footnotes omitted).



In the present case, Celotex did everything which was logically possible to show that the Plaintiff would not be able to meet her burden of proof at trial. First, the Defendants jointly propounded discovery seeking disclosure of facts establishing decedent's exposure to asbestos-containing products. In response, Plaintiff produced nothing to indicate any exposure of decedent to Celotex products. The Defendants then moved to compel further answers to interrogatories. In response, certain answers to interrogatories were supplemented, but still Plaintiff produced nothing indicating exposure of decedent to Celotex's products.

Celotex thereupon filed a Motion for Summary Judgment specifically calling the Court's attention to the lack of evidence of exposure to Celotex's products.[3] If such a showing is an insufficient basis upon which to support a summary judgment motion, then it is difficult to understand how a defendant which contended that its products did not cause the Plaintiff's injuries could ever force a plaintiff to show that she could survive a directed verdict motion at trial.

The restrictive view of the availability of summary judgment which was adopted by the majority below has adverse consequences not only in products liability cases, but in many other types of litigation as well. As was observed in Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707, 716-17 (1984):

> This absurd refusal to consider the plaintiff's apparent inability to succeed at trial emasculates the single most important use of summary judgment: the pretrial dismissal of unprovable and sometimes spur-

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[3] Although Celotex's second Motion for Summary Judgment referred to a complete lack of exposure to Celotex's products within the jurisdictional limits of the District Court, it clearly referred to Plaintiff's failure to respond to discovery requests in a manner which indicated any exposure to Celotex products.

> ious claims for relief. Summary judgment, moreover, is the only available pretrial device designed to search out such deficiencies. Its emasculation is especially unfortunate in this time of rising litigation costs, crowded dockets, and general dissatisfaction with the administration of civil justice.

(footnotes omitted).

The importance of the summary judgment procedure in disposing of claims which evidently cannot be proved at trial was also emphasized in Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 Nw. U.L. Rev. 774, 785 (1983), and in American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207 (1981). As the latter report points out:

> [E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.

*Id.* at 231, *quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

Since the Plaintiff must prove her case at trial in any event, there is no reason not to require her to provide some indication that she is able to do so in order to defeat a Motion for Summary Judgment. The fact that the Defendant has been unable to achieve the logically impossible burden of "proving the negative" by demonstrating conclusively that the Plaintiff's claim *cannot* be proven is no reason to alter this result.

Although some courts have expressed concern that relaxation of the initial burden upon a defendant which



is moving for summary judgment could lead to the harassment of plaintiffs with unjustified and premature summary judgment motions, there are ample procedural devices available under Rule 56 to control such potential abuses. First, if a summary judgment motion is filed before the party opposing the motion has an opportunity to discover evidence with which to satisfy that party's burden of proof, Rule 56(f) expressly permits the trial court to deny or delay consideration of the motion until the party opposing it has had time to conduct discovery.[4] Second, if a summary judgment motion is filed in the absence of any indication that the party with the burden of proof might be unable to discharge that burden (for example, before the movant has propounded discovery designed to reveal the basis of the claim), then sanctions might well be imposed under either Rule 11 or Rule 56(g) of the Federal Rules of Civil Procedure.

For the reasons set forth above, it is respectfully suggested that Celotex provided sufficient support for its Motion for Summary Judgment to require that the Plaintiff demonstrate that she could produce some admissible evidence in order to survive a motion for directed verdict at the time of trial.

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[4] As was pointed out in the dissent below, no such request was ever made in this case. Moreover, since the case had been pending for nearly two years when summary judgment was granted, there would appear to be little basis for concern that the Plaintiff had not yet had an opportunity to attempt to discover some admissible evidence to support her claims against Celotex.

## II. The Majority Below Erred In Considering Material Submitted By The Plaintiff In Opposition To Celotex's Motion For Summary Judgment Which Was Not Admissible Itself And Which Did Not Give Any Indication That The Plaintiff Would Be Able To Produce Admissible Evidence At Trial.

Plaintiff's response to Celotex's Motion for Summary Judgment proffered as evidence of decedent's exposure to Celotex's products only three pieces of evidence: a copy of the testimony of Plaintiff's decedent in a workmen's compensation proceeding to which Celotex was not a party, and which only alleged that a *foreign subsidiary*[5] of Celo- against Celotex (J.A. 189-90), and copies of two letters which did not purport to be made upon personal knowledge and which only alleged that a *foreign subsidiary*[5] of Celotex was a manufacturer of certain products to which decedent had been exposed.[6] It was upon the basis of this opposition, and of Plaintiff's failure during discovery to produce *any* evidence of exposure to Celotex's products, that the trial court concluded that there was no evidence of exposure to Celotex's products either in the District of Columbia or elsewhere (J.A. 217). Having concluded that Plaintiff had no evidence with which to prove her case,

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[5] The *subsidiary's* potential liability was not at issue since it had never been named as a defendant, nor had any facts been alleged which would conceivably suggest that Celotex was liable for injuries caused by products manufactured and sold by its subsidiary.

[6] Even if these objections were somehow overcome, plaintiff's contention that these letters are routine business records is clearly without merit. The letters were written for the specific purpose of use in this litigation. They were written by one of decedent's employers and that employer's workmen's compensation insurer —which had paid compensation benefits and therefore acquired a direct interest in the successful prosecution of plaintiff's claim.



the trial court granted Celotex's Motion for Summary Judgment.

Although the majority below stated that it did not reach the evidentiary issue, 756 F.2d at 184 (J.A. 223), it clearly recognized the inadmissibility of all of the evidence which Plaintiff submitted in opposition to Celotex's motion.[7] As has been discussed above, one of the principal purposes of the summary judgment procedure is to eliminate the inconvenience and expense of a trial where a party which has the burden of proof on an issue has no admissible evidence with which to survive a motion for directed verdict. As the dissent below demonstrates, this function is destroyed if the party opposing the motion is able to defeat it upon the basis of evidence which would not be admissible at trial.

It is for this reason that Rule 56(e) expressly requires that summary judgment affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." If a party is able to produce such an affidavit, then there is good reason to believe that admissible testimony will be available from the affiant. Where, on the other hand, a party opposes a summary judgment motion with material which is neither admissible itself nor an affidavit which meets the above requirements, there is

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[7] Thus, the majority acknowledges that, "[t]rue, the evidence was not in admissible form . . ." 756 F.2d at 186 (J.A. 228), and "Mrs. Catrett *has* not offered admissible evidence. . . ." 756 F.2d at 186 (Emphasis original).

little reason for confidence that admissible evidence will be produced at the time of trial.[8]

In considering evidence proffered by Plaintiff which would clearly be inadmissible at trial, the majority ignored a long line of precedent holding that the only material which may be considered in deciding whether a genuine issue of material facts exists are affidavits meeting the requirements of Rule 56 and other evidence which would be admissible at trial. *See, e.g., Martz v. Union Labor Life Insurance Co.,* 757 F.2d 135, 138 (7th Cir. 1985); *General GMC Trucks, Inc. v. Mercury Freight Lines, Inc.,* 704 F.2d 1237, 1239 (11th Cir. 1983); *Meserole v. M/V Fina Belgique,* 736 F.2d 147, 149 (5th Cir. 1984); *Daily Press, Inc. v. United Press International,* 412 F.2d 126, 133 (6th Cir. 1969).

As Judge Bork's dissent indicated, the consideration of inadmissible evidence is not only contrary to well-established precedent, it will inevitably lead to pointless trials and thereby "substantially undermine the utility of summary judgment procedures while yielding no concomitant benefits." 756 F.2d at 191 (J.A. 241). This Court should therefore reaffirm the well-established rule that a Motion for Summary Judgment may be opposed only with an affidavit meeting the requirements of Rule 56 or with other material which would be such as to be admissible at trial.

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[8] This would appear to be particularly true where, as here, the party opposing the motion has had nearly two years after the filing of suit—and more than six months after the filing of the summary judgment motion—in which to discover some admissible evidence, but has not yet been able to do so.



## CONCLUSION

For the reasons set forth above, Petitioner respectfully urges that this Court reverse the judgment of the Court of Appeals and reinstate the judgment of the District Court.

Respectfully submitted,

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# RESPONDENT'S

# BRIEF

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-198

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

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THE CELOTEX CORPORATION,
*Petitioner,*

v.

MYRTLE NELL CATRETT, Administratrix
of the Estate of Louis H. Catrett, Deceased,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Whether a plaintiff who has pleaded a valid tort claim must come forward with admissible evidence supporting her claim in response to a summary judgment motion that is legally deficient on its face because the only undisputed fact even asserted in the motion provides no legal basis for a judgment for the defendant.

2. Whether a plaintiff who has pleaded a valid tort claim and identified relevant evidence she plans to introduce at trial can be required to submit admissible evidence in her response to a summary judgment motion by the defendant that merely repeats the general denials already set out in the answer to the complaint and is based on no evidence whatever.

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENT

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### STATEMENT OF THE CASE

This is a wrongful death and survival action brought by the widow of an asbestos worker who died in 1979 of a form of cancer known as mesothelioma, which is caused by inhalation of asbestos fibers. The lawsuit was filed in the United States District Court for the District of Columbia on September 2, 1980, against a group of fifteen original defendants—all of them manufacturers of asbestos insulation products.[1] The sole issue raised

[1] Federal jurisdiction was premised on diversity of citizenship.

here is the validity of a summary judgment granted to one of those defendants, petitioner The Celotex Corporation.[2]

The essential facts can be quickly summarized. The district court granted summary judgment after finding that respondent had failed to make an adequate showing of the decedent's exposure to Celotex products. J.A. 217. At the time of this ruling, respondent had indicated that one of her witnesses at trial would be Mr. T.R. Hoff, an employee of the Anning-Johnson Company in Illinois. She had previously submitted to counsel and the court a letter from Mr. Hoff stating that the decedent worked directly with an asbestos product made by Celotex's predecessor corporation, while he was employed at Anning-Johnson in 1971-72. J.A. 162, 197. This same specific allegation was further corroborated by two other hearsay documents filed by respondent, including a deposition of the decedent himself taken in a prior case. J.A. 164, 195. Finally, the record contained sales records, produced by Celotex, which reflected sales to Anning-Johnson of the relevant asbestos products during the relevant time period by a division of petitioner's predecessor company.[3] Petitioner, although aware of these specific allegations and documents, made no effort in its summary judgment motion to produce evidence under-

[2] The district court ultimately granted summary judgment to thirteen of the defendants, dismissed the case against another one for improper service of process, and dismissed the case against the final one for lack of personal jurisdiction. In addition to the Celotex order, respondent appealed the orders in favor of defendants Armstrong World Industries and Turner & Newall. These other appeals were discontinued after the parties reached monetary settlements. J.A. 221 n.1.

[3] Celotex Motion for Change of Venue (December 14, 1981) (Exhibit D) (Record Document 129). An example of these sales records is appended to this brief. The record in this case is not consecutively paginated. The document numbers used here correspond to the numbering on the district court docket sheet.



mining or contesting respondent's proposed trial case. Nevertheless, the court granted summary judgment for petitioner, based on the apparent assumption that respondent had a duty to respond to this unsupported summary judgment motion with "admissible" evidence, such as affidavits from potential witnesses.

In order to place these key facts in proper context, it is useful to review the pretrial proceedings in some detail. According to the complaint, respondent's decedent, Louis Catrett, used asbestos insulation products in all of his work during the period 1957-72.[4] J.A. 11. During this time, he was employed by more than a dozen different construction companies, both in the Washington area and around the country, J.A. 31-34, and used a wide variety of different insulation materials. The result was a lawsuit in which the evidence of each defendant's liability was necessarily complex and could not be fully marshalled without a substantial period of pretrial discovery.

During the first four months following the filing of the lawsuit, the defendants, including Celotex, answered the complaint and served a total of nine separate sets of interrogatories and seven requests for production of documents. Respondent then moved for a protective order pursuant to Fed. R. Civ. P. 26(c), asking the court to require that the defendants' discovery begin with a set of joint interrogatories and a joint document request. On February 3, 1981, the court entered an order requiring the defendants to begin their discovery with a joint set of interrogatories.[5] The joint interrogatories

[4] It subsequently became clear that the decedent's exposure began even earlier than 1957. *See* J.A. 142 (plaintiff's response to first Celotex motion for summary judgment) (decedent worked "for approximately twenty-five years as a plasterer with extensive exposure to asbestos products . . . at approximately forty-seven (47) different worksites throughout the country").

[5] Record Document 46A; *see* J.A. 65-66. It is therefore misleading for petitioner to complain, at page 3 of its brief, that respond-

were served on February 13, 1981, and, after several extensions of time agreed to by the defendants, J.A. 71-72, were duly answered by respondent on June 29, 1981, J.A. 24.

In these interrogatories, the defendants had asked respondent to identify every person who might have knowledge of the relevant facts, J.A. 50-51 (Interrogatory 26), and give a comprehensive history of Mr. Catrett's exposure to asbestos, including the location of each exposure, the type of product used, the persons supervising the job, any safety devices used, and a variety of other matters, J.A. 62-63 (Interrogatory 51). Because respondent did not yet have the information required to answer all of these questions fully, she promised to supply the requested material when it was available. In this initial answer she did, however, include a complete employment history for Mr. Catrett. J.A. 27-34. In response, the defendants on July 27, 1981 filed a motion to compel discovery or, in the alternative, to dismiss the case. J.A. 64. This motion was never acted on by the district court.

In the ensuing six months, as respondent was attempting to complete preparation of her evidence, she was served with twelve individual sets of interrogatories, and twelve motions for summary judgment. Petitioner Celotex filed such a motion on September 28, 1981, complaining in part that it had not received a response to its own interrogatories, and arguing that respondent had produced no evidence to show the liability of Celotex. J.A. 73. On October 20, respondent answered this motion in several ways. First, she pointed out that no such Celotex interrogatories had ever been served. J.A.

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ent never responded to an October 17, 1980 document request filed by Celotex. As *petitioner* flatly stated in the district court, under the protective order, "plaintiff was relieved of her obligation to respond to Celotex's first set of interrogatories *and request for documents.*" J.A. 76 n.2 (emphasis added).



135-36. Second, she argued that petitioner had failed to offer any evidence to support its motion and that it was unfair, while discovery was still proceeding, to expect her to answer such a motion with admissible evidence of her own. J.A. 141-42. Finally, she submitted the three documents mentioned above, all of which indicated that Mr. Catrett was exposed to Celotex insulation products during the period 1971-72, while employed by the Anning-Johnson Company of Illinois. These documents were (1) a letter to counsel from Anning-Johnson's insurance company indicating that such exposure occurred, J.A. 160, (2) a letter to the same insurer from the Anning-Johnson employee, T.R. Hoff, describing the same facts, J.A. 162, and (3) a deposition of Mr. Catrett taken in a prior workers compensation proceeding against Anning-Johnson, J.A. 164.[6]

Apparently because of its oversight in failing to serve interrogatories, petitioner withdrew this summary judgment motion on November 9, 1981. It then served interrogatories on November 24, 1981. There followed a December 4 status conference, in which counsel for petitioner indicated that, on the basis of the information produced by respondent, it had investigated Mr. Catrett's exposure to Celotex products while at Anning-Johnson. Counsel represented that Mr. Catrett did indeed use Celotex products during 1971-72, but that he had been advised that the product was "completely enclosed" and thus could not have contributed to Mr. Catrett's disease.[7]

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[6] All three documents referred to Mr. Catrett's use of a product known as "firebar," which was distributed by the patent holder, Universal Firebar, Inc., but manufactured in Canada by Carey-Canadian Asbestos, a division of Panacon Corp., which was later merged into Celotex. *See* notes 11 & 14 *infra*.

[7] Tr., 12/4/81, at 11 ("There was a product used while he was employed, but it was not something to which he was exposed. That is the information I have. . . . It was a completely enclosed product, and there was no possible exposure.") Counsel made this representation even though, in his deposition transcript, the decedent

He further indicated that he would present evidence of this contention in a renewed motion for summary judgment.[8]

There followed two motions by petitioner. First, on December 14, 1981, Celotex moved for a change of venue to Chicago, based on the fact that respondent was relying on exposure to its products during 1971-72, when Mr. Catrett worked in Illinois for Anning-Johnson.[9] Attached to this motion were sales records confirming that the asbestos insulation products allegedly used by Mr. Catrett were in fact sold to Anning-Johnson during the relevant period by "Carey Canadian Asbestos, A Division of Panacon Corporation." [10] Celotex had previously admitted that it had assumed the liabilities of Panacon when that company was merged into Celotex in 1972.[11]

On December 23, petitioner filed its promised second summary judgment motion. In this motion, it first asserted that respondent was delinquent in responding to petitioner's interrogatories.[12] Then, without submitting any evidence of its own, Celotex argued that summary

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had described the product he used—"firebar"—as a powder that was mixed into a liquid and then *sprayed* on surfaces to fireproof them. J.A. 164A-64C, 164G-64I.

[8] Tr., 12/4/81, at 11 ("That is the information I have right now, and I am writing it down.")

[9] Record Document 129.

[10] *Id.* (Exh. D) (an example is appended to this brief).

[11] J.A. 115 (Celotex Response to Plaintiff's Interrogatories, October 2, 1981). In numerous other cases, Celotex has not contested its liability for exposure to Panacon's products, arguing instead only that it should be insulated from *punitive* damages stemming from the predecessor corporation's conduct. *See, e.g., Krull v. Celotex Corp.*, 611 F. Supp. 146 (N.D. Ill. 1985); *In re Asbestos Related Cases*, 566 F. Supp. 818 (N.D. Cal. 1983).

[12] In fact, these interrogatories had only been filed 29 days prior to the filing of the motion. J.A. 168. Respondent's answers were filed five days later, on December 28. J.A. 178.



judgment was proper because *respondent* had failed to produce sufficient evidence of exposure to the company's products. In so arguing, however, petitioner explicitly based its motion on the premise that respondent was required to show exposure *in the District of Columbia.* Its motion asserted only that respondent had failed to produce evidence that a Celotex product "was the proximate cause of the injuries alleged within the jurisdictional limits of this Court." J.A. 170.[13] Significantly, petitioner omitted any discussion whatever of its own investigation of Mr. Catrett's exposure to its products while at Anning-Johnson. It did not deny that it had sold products to Anning-Johnson during the relevant time period.[14] And, contrary to the representations made by counsel just nineteen days earlier, it offered no evidence or assertion that the product involved was sufficiently "enclosed" to avoid any inhalation of asbestos fibers.

In a response to this second summary judgment motion, dated January 4, 1982, respondent again argued that Celotex had a duty to come forward first with some evidence supporting its denials of liability. J.A. 190-91. She also pointed out that exposure in Washington, D.C. was not the legally dispositive question and therefore

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[13] In the accompanying brief, petitioner explained that an essential element of respondent's case is a showing that Celotex caused the decedent's injuries, and then simply stated that "[t]he record is totally devoid of any such evidence within the jurisdictional confines of this Court," J.A. 175.

[14] Indeed, the sales records attached to petitioner's own motion for change of venue would have conclusively contradicted such a claim. It was only on appeal that petitioner began raising the issue whether the products sold to Anning-Johnson might have come from a subsidiary for which it was not legally responsible. See Pet. Br. 5. Even if this suggestion were not conclusively contradicted by the sales records' reference to "Carey Canadian Asbestos, *A Division* of Panacon Corporation," (emphasis added), this would simply be one of many factual issues that petitioner could have, but did not, raise in the district court.

simply was not a relevant issue on a motion for summary judgment. J.A. 191-92. Finally, she again attached the aforementioned letters and deposition transcript describing the decedent's exposure to Celotex products while at Anning-Johnson.

Less than a month later, respondent made two additional filings. On February 1, 1982, she filed supplemental answers to defendants' interrogatories in which she designated several trial witnesses—including T.R. Hoff, the Anning-Johnson employee whose letter was already in the record. J.A. 201. Two days later, she made specific reference to this designation of Mr. Hoff in her brief in opposition to the Celotex venue motion.[15]

Nearly six months then went by before the district court held a hearing on the venue and summary judgment motions on July 21, 1982. At this hearing, counsel for petitioner continued to focus primarily on the absence of evidence of exposure in the District of Columbia. J.A. 211-14. For the first time, however, he commented in passing on the broader issue that was not raised in his written motion for summary judgment: whether the decedent had been exposed to Celotex products *outside* the District. He argued that the letters and deposition were inadmissible hearsay, and thus could not be used to establish exposure to Celotex products by the decedent. J.A. 212-13.

In response, counsel for respondent made reference to the sales records produced by Celotex, as one more indication of the substantial nature of the claims against that company. J.A. 214. Thereafter, although the district court's questions focused exclusively on whether there was evidence of exposure in D.C., the court nevertheless concluded that there was "no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere*," J.A. 217 (emphasis added), and granted summary judgment for petitioner on that basis. In so ruling, the court apparently accepted petitioner's argument that the documents submitted by respondent were irrelevant because they would not, themselves, be admissible at trial.

[15] Plaintiff's Opposition to Motion of Defendant Celotex Corporation for Change of Venue, at 4 (February 3, 1982) (Record Document 164) ("[Plaintiff] intends to call Terry R. Hoff, Assistant Secretary of Anning-Johnson Company to establish that plaintiff's deceased husband was employed by Anning-Johnson Company to spray asbestos products manufactured by defendant.")



Respondent appealed, and the United States Court of Appeals for the District of Columbia Circuit reversed. The majority concluded that the "defendant's moving papers were patently defective on their face, rendering inappropriate the grant of summary judgment on the record as it stood before the District Court." J.A. 223. Citing a long line of cases, the court held that petitioner was obligated to come forward with some form of evidentiary showing before it could shift the burden to respondent to produce admissible evidence of its liability. The court recognized that it is sometimes difficult for defendants to offer evidence to "prove a negative," J.A. 224, but suggested implicitly that the appropriate showing in such a case is an evidentiary attack on the *plaintiff's* proposed trial case, as revealed in discovery.[16] Here, the court noted, the plaintiff had produced evidence (albeit perhaps inadmissible itself) that indicated to the defendants the particular facts that she was seeking to prove at trial. Yet the defendant did nothing to dispute, through its own affidavits or discovery, the validity of this proposed factual showing. As a result, the plaintiff had no obligation to come forward with any affidavits or evidence of her own.

[16] The court noted that where the defendant's difficulties of proof stem from a plaintiff's failure to comply with discovery requests, the appropriate response is to seek sanctions under the discovery rules. J.A. 227 n.12.

Judge Bork dissented. In his view, when a defendant makes a motion for summary judgment and simply argues that the plaintiff lacks the evidence required to prove the case, it is reasonable to expect the plaintiff to produce admissible evidence of liability. There should be no requirement of a prior evidentiary showing by the defendant, he stated, because summary judgment is analogous to a directed verdict, which a defendant may win at trial simply by pointing to the inadequacy of the plaintiff's case. J.A. 235-37. Judge Bork also concluded that the production of inadmissible evidence in response to such a summary judgment motion should not be enough to allow the plaintiff to proceed to trial. J.A. 241-42.

The court of appeals denied a petition for rehearing *en banc* on May 7, 1985.

## SUMMARY OF ARGUMENT

Petitioner's motion for summary judgment clearly was not sufficient to create any duty on the part of respondent to submit an evidentiary response in order to preserve her right to a trial on her claim. As a result, the court below was correct in holding that the admissibility of the three documents submitted by respondent in her opposition to the motion was irrelevant. Respondent need not have filed any documents at all.

First, the motion only asserted one undisputed fact: the decedent's lack of exposure to Celotex asbestos products *in the District of Columbia*. While accurate, this assertion provided no legal basis for a judgment in favor of petitioner. Respondent's claim was based on alleged exposures outside the District, and petitioner did not, and could not, show that these allegations were somehow immaterial as a matter of law. As a result, the motion was legally deficient on its face.

Second, even assuming that petitioner had denied in its motion the decedent's exposure to Celotex products in any



locale, respondent still would not have been required to submit an evidentiary response. By the time of this motion, respondent had told petitioner the specific facts that she planned to prove at trial, as well as the name of an employee with knowledge of these facts. Celotex itself had produced sales records corroborating these allegations. Soon thereafter, respondent designated this same employee as a witness for trial. Yet petitioner in its motion presented no evidence whatsoever to show its lack of responsibility for the decedent's injuries or to undermine the prospective trial case outlined by respondent.

In such circumstances, Rule 56, Fed. R. Civ. P., imposes no obligation on the nonmoving party to respond in any way, because the summary judgment motion itself fails to show the absence of a material dispute of fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). A defendant cannot, simply by repeating the general denials of its answer in a motion, impose a burden on the plaintiff to present her case in the form of affidavits or other "admissible" evidence. A party who pleads a legally valid claim or defense, and can point to evidence to be used at trial, has a right to go to trial on that basis alone, absent an evidentiary showing that calls into question the substantiality of her factual allegations.

The duty of the moving party to come forward first with an evidentiary showing is fully applicable even where that party is a defendant, who would not have the burden of proof at trial. *Adickes, supra.* It is also fully applicable where a defendant claims that it is unable to submit evidence to "prove a negative." While a defendant manufacturer may not always be able to prove directly its lack of responsibility for a particular injury, it can, through discovery, obtain a preview of the plaintiff's proposed trial case, and then attempt to put together an evidentiary showing that undermines the significance of the evidence identified by the plaintiff. Where such a showing is made, the burden shifts to the plaintiff

to produce evidence in admissible form and demonstrate that it is sufficient to create a triable dispute of fact. *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968).

Here, petitioner knew the specific facts that respondent planned to prove, as well as the name of her key witness. It even started to look into these allegations. But its summary judgment motion contained no evidence whatever to indicate that respondent's proposed trial case was insubstantial. The motion simply called on respondent to come forward with evidence, during the pretrial period, in admissible form. This was a demand that petitioner could only make after it had first made its own evidentiary showing.

## ARGUMENT

The central issue here is whether respondent forfeited her right to a trial on the merits because she failed to submit admissible evidence in her response to petitioner's motion for summary judgment.[17] The resolution of this issue turns on the nature of the motion filed by petitioner and whether it was sufficient to create a duty to submit an evidentiary response. In our view, respondent, like all plaintiffs, had a duty to be able to *identify*, at a suitable time, evidence that she intended to use at trial, and she did so. But the motion filed here by petitioner was plainly

[17] "Admissible" evidence in this context means either (1) affidavits or depositions reflecting the testimony that a live witness could give at trial, (2) properly authenticated exhibits that could be introduced at trial, or (3) statements made by the opposing party in pleadings, admissions, interrogatory answers, etc. *See generally* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2722. Affidavits, of course, would not themselves typically be admitted in evidence at trial.

While there may be arguments that one of the documents submitted by respondent—the sworn deposition of the decedent in a previous workers compensation proceeding—should be deemed admissible at trial under the catch-all authority of Fed. R. Evid. 804(5), we do not press this issue here.



insufficient to create a further duty to present that evidence in the form of affidavits or other admissible documents.

### I. The Grant of Summary Judgment in this Case was Improper Because the Motion Failed Even to Assert a Set of Facts Sufficient to Justify a Judgment as a Matter of Law.

According to petitioner, the issue presented to this Court is whether a plaintiff in an asbestos case should have a duty to come forward with admissible evidence of exposure to a defendant's products, where the defendant has filed an unsupported summary judgment motion that simply denies such exposure. This question is not, however, actually raised on the facts of this case, because the motion filed by Celotex had another, even more fundamental, flaw: it did not even deny that Celotex products had injured the decedent. The motion made only one claim—that "plaintiff ha[d] failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court*." J.A. 170 (emphasis added).[18] Faced with this motion, respondent clearly had no duty to make any sort of factual showing, because the only undisputed fact even

[18] This same limited claim was then repeated in petitioner's brief in support of summary judgment, J.A. 175, and the accompanying "Statement of Material Facts as to Which There is No Genuine Issue," J.A. 171. Petitioner's contrary description of the motion, Pet. Br. 21 n.3, is simply inaccurate.

At the oral argument on the motion, counsel for petitioner, for the first time, appeared to call into question respondent's ability to prove exposure outside Washington, D.C. J.A. 212. However, this ambiguous comment obviously came far too late to provide respondent notice that Celotex intended to contest this issue. *Cf.* note 34 *infra* (when *court* is considering a *sua sponte* grant of summary judgment, it must give sufficient notice to party of his duty to produce evidence supporting his claim).

arguably asserted by petitioner was legally insufficient to justify a judgment for Celotex.[19]

Under Rule 56, Fed. R. Civ. P., a party moving for summary judgment must make two basic showings. He must show (1) "that there is no genuine issue as to any material fact," and (2) "that [he] is entitled to a judgment as a matter of law." These two matters are closely related. In essence, the movant typically asserts that certain facts cannot be disputed, and that any other factual issues are immaterial because the undisputed facts are sufficient to justify judgment for him as a matter of law. *See generally* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2725, at 93-95.

In the present case, petitioner only claimed, at the very most,[20] the existence of one undisputed fact concerning events that caused the death of Mr. Catrett—*i.e.*, the absence of exposure to Celotex products in Washington, D.C. This was not enough. Since it was clear that respondent's case against Celotex was based on allegations of exposure *outside* the District of Columbia, petitioner had a further duty of showing that these other allegations were immaterial. This it did not, and could not, do.

The problem was that there is no legal theory under which respondent's claim can be made to depend on a showing of injury in a certain jurisdiction. As a matter of law, the location of the tort could only have been relevant to matters other than the disposition of the case on

[19] The inadequacy of petitioner's factual claims was asserted by respondent both in her response to the summary judgment motion, J.A. 191, and in her brief in the court of appeals, Appellant's Br. at 21-22.

[20] It is not altogether clear that petitioner made any assertion of fact whatever with regard to the underlying merits of the case. The motion was primarily addressed, not to the merits, but to respondent's level of compliance with defense discovery requests. J.A. 170 *et seq.* As we discuss *infra*, this is a matter that is properly addressed through a motion to compel, not a motion for summary judgment.



the merits—choice of law, a discretionary change of venue,[21] or, conceivably, personal jurisdiction.[22] As a result, petitioner's motion, on its face, failed to establish the company's right to summary judgment.

Upon receiving such a motion, respondent would have been well within her rights simply to point out the legal deficiency of petitioner's argument. While making this point, J.A. 191, respondent chose to do more, and submitted the two letters and the deposition transcript to illustrate the substantiality of her allegations of exposure outside the District of Columbia. At that point, it was hardly reasonable for petitioner and the district court to criticize her for failing to go even further and submit sworn affidavits or depositions proving her claim. On the contrary, before any obligation to respond with evidence can possibly arise, a defendant's summary judgment motion must at least *assert* a set of undisputed facts that are legally sufficient for it to prevail. Here, the motion simply missed the point.[23]

[21] As we have noted, petitioner requested just such a transfer of the case in a motion filed nine days before its summary judgment motion.

[22] It is doubtful that Celotex could have raised a substantial issue of personal jurisdiction in this case. Celotex has a certificate to do business in the District of Columbia, J.A. 86, and its predecessor-in-interest distributed asbestos products on a national basis. Moreover, the cancer that killed the decedent only formed years after the exposure, when he had returned to Washington. J.A. 25, 33-34, 37-40. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). *See also* D.C. Code Ann. § 13-423(4).

In any event, lack of personal jurisdiction would not have justified a merits ruling like that entered here—exculpating Celotex from liability for all injuries to the decedent in all locales. Instead, the appropriate outcome would have been a transfer to another federal district. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-67 (1962).

[23] In light of these facts, the Court may wish to consider entering an order dismissing the writ of certiorari in this case as improvidently granted.

## II. The Court of Appeals Correctly Held that Petitioner's Summary Judgment Motion was Facially Deficient Because it Did Not Include Any Sort of Evidentiary Showing.

The court of appeals in this case decided to treat petitioner's motion as if the motion had, in fact, denied the decedent's exposure to Celotex products in *any* locale. Having done so, however, the court held that the motion was still facially deficient, because it included no evidence whatever supporting petitioner's claimed right to summary judgment. This ruling was neither novel nor controversial. The plain language of the summary judgment rule itself, as interpreted on numerous occasions in this Court and the lower federal courts, provides that when a party files a summary judgment motion calling into question his opponent's factual allegations, he must include a sufficient *evidentiary* showing. Absent such a showing, the nonmoving party has no duty even to respond.

### A. Respondent Had No Duty to Respond to Petitioner's Motion in Any Way.

Even if petitioner's motion had addressed the material issue of fact in this case—*i.e.*, the decedent's exposure to Celotex products in any location—the motion would still have constituted nothing more than a repetition of the general denials already contained in the company's answer to the complaint. Petitioner's basic position here is that it was entitled to repeat these denials in the form of a motion, and thereby force respondent to come forward with admissible evidence to support her claim. Celotex makes this argument even though, at the time of its motion, it (1) had been given specific information about the exposure respondent planned to prove at trial, as well as the name of an employee with personal knowledge of the relevant events, and (2) had itself produced sales records documenting its sale of the relevant asbestos product to the decedent's employer during the relevant time period. Soon thereafter, and months before the court



acted on the summary judgment motion, respondent specifically designated the previously identified employee as a witness for trial and so informed the court.[24] *See* J.A. 201; p. 8, *supra*. The gist of the Celotex position is that, having received this information about its opponent's prospective trial case, it could produce no contrary evidence of its own and still force respondent to go to the trouble of submitting affidavits or other admissible evidence to show the validity of her case before trial.

This position is wholly without merit. It is black letter law that where a party's motion for summary judgment seeks to contest an opponent's allegations, but fails to include a sufficient *evidentiary* showing that calls those allegations into question, the opposing party has no duty to respond to the motion in any way whatsoever. In this case, respondent, like any other plaintiff, had an obligation to respond to reasonable requests from the defendant or the court for an *identification* of the evidence she intended to use at trial to establish each essential element of her claim.[25] But, having done so, she had every right

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[24] In view of these facts, there is no basis for petitioner's implicit suggestion that respondent's answer to the summary judgment motion demonstrated that her case was meritless. Certainly it is hard to see how *amicus* Motor Vehicle Manufacturers *et al.* can assert that respondent "in substance *admitted* that she possessed no competent evidence." Br. at 20. The record contains no such admission.

[25] Such requests from opponents typically come in the form of interrogatories. The court typically asks for an outline of the plaintiff's case at a pretrial conference convened pursuant to Fed. R. Civ. P. 16.

In addition, any party has a duty to respond to a request for production of relevant documents. But compliance with such a request is again quite different from going to the trouble of incorporating such documents in a formal evidentiary response to a properly supported summary judgment motion. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2722, at 58-60 (exhibits, to be considered on motion for summary judgment, must be authenticated by an accompanying affidavit).

to go to trial on her claim, unless petitioner came forward with some evidentiary showing indicating that her case was without merit.

This basic principle is specifically incorporated in the governing rule itself. To be sure, Rule 56 provides that a proper motion for summary judgment creates a duty on the part of the opponent to submit a response that "by affidavits or as otherwise provided in this rule, . . . set[s] forth specific facts showing that there is a genuine issue for trial." Rule 56(e). But a motion only creates such a duty when it is "made *and supported* as provided in this rule," *id.* (emphasis added)—*i.e.*, when it contains some evidence that goes beyond the movant's own mere allegations of fact.

Even if this language were somehow ambiguous, the accompanying Advisory Committee note would resolve all doubts. The committee emphasized that the rule does not require an evidentiary response by the nonmoving party in every case. On the contrary, "[w]here the *evidentiary matter* in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56, *reprinted in* 6 *Moore's Federal Practice* ¶ 56.01[14], at 56-22 (emphasis added).[26]

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[26] Several years before the language quoted here was added to the rule, the same language was proposed but not adopted. At that time, the committee explained that it wished to make it clear that "*where the motion for summary judgment is supported by depositions or affidavits*, the opposing party must make a similar presentation to show the existence of a genuine issue of fact." Advisory Committee Note on Proposed 1955 Amendment to subdivision (e) of Rule 56, *reprinted in Moore's Federal Practice* ¶ 56.01[9], at 56-19 (emphasis added).

The issue, when this language was being considered, was whether a nonmoving party, even in responding to the evidentiary showing of a moving party, could rely simply on the "well-pleaded" allegations of his pleading. *See id.* ¶¶ 56.01[9], [14], .11, at 56-232. The amendment made it clear that a party must meet an evidentiary showing with some evidence of his own. But it never even occurred to anyone at the time that a nonmoving party might be required to make an evidentiary showing where the moving party had not done so.



The courts have not been hesitant to follow this clear rule. The most prominent decision in this area is *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), where this Court reversed a grant of summary judgment for a defendant on the ground that its motion had failed to include sufficient evidence contradicting the allegations made by the plaintiff. The case involved an alleged conspiracy between a store and a police department to deny service to a customer for racially discriminatory reasons. The defendant, in moving for summary judgment, had offered some evidence to counter the conspiracy claim, but had failed to contradict one factual allegation that could be seen as supporting the claim—*i.e.*, the allegation that a policeman was present in the store at the time of the incident. In response, the plaintiff relied solely on unsworn or inadmissible evidence.[27] The Court ruled for the plaintiff on the ground that the moving party has "the burden of showing the absence of a genuine issue as to any material fact." *Id.* at 157. Because the defendant's initial evidentiary showing failed to contest one of the factual bases of the plaintiff's claim, the deficiencies of her responsive showing were irrelevant: the plaintiff simply "was not required to come forward with suitable opposing affidavits." *Id.* at 160.[28] *See also Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

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[27] The plaintiff relied on a hearsay statement in her own deposition and an unsworn statement by a store employee. *Id.* at 159 & n. 19.

[28] Petitioner's effort to distinguish *Adickes* is based on the misleading assertion that the plaintiff in that case did come forward with "circumstantial evidence to support her theory" in response to the motion for summary judgment. Pet. Br. at 14. This assertion misses the point. As we have noted, all of the evidence put forward

Similarly, despite petitioner's efforts to show otherwise,[29] the courts of appeals are unanimous in their recognition of the moving party's duty to come forward first with some evidence in support of his summary judgment claim, before the opponent can be required to produce any evidence or respond in any way.[30] And the leading trea-

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by the plaintiff, be it "direct" or "circumstantial," was inadmissible and/or unsworn. 398 U.S. at 159 & n. 19. The Court did not find this to be a problem because it held that the district court would have been required to deny summary judgment *even if the plaintiff had produced no response whatever.* *Id.* at 160-61. In the instant case, of course, while the documents submitted by respondent were hearsay, she also pointed to *direct* evidence of her claim—the testimony of Mr. Hoff—that she planned to offer at trial.

[29] The cases cited by petitioner do not relate to the issue at hand, because they involve the quite different situation where a defendant *has* come forward with some sort of evidentiary showing, and thereby shifted the burden of production to the plaintiff. A good example is *In Re Japanese Electronic Products*, 723 F.2d 238 (1983), *cert. granted*, 105 S. Ct. 1863 (1985) (No. 83-2004), cited in Pet. Br. at 17. In that case, summary judgment was granted only after the parties had submitted what the district court called "one of the most complete summary judgment records ever put before any court." 513 F. Supp. at 1143.

[30] The duty of a moving party to come forward with evidence has been recognized in every circuit. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1281-82 (D.C. Cir. 1979) ("the party opposing summary judgment need not present any evidentiary matter unless the movant has made a prima facie showing that the case is completely free from any significant question of fact"); *Mack v. Cape Elizabeth School Board*, 553 F.2d 720, 722 (1st Cir. 1977) ("defendants could not, by filing incomplete affidavits, impose a burden on plaintiff"); *Patrick v. LeFevre*, 745 F.2d 153, 160 (2d Cir. 1984) (where evidentiary matter submitted by defendant is insufficient, " 'summary judgment must be denied even if no opposing evidentiary matter is presented' ") (quoting 1963 Advisory Committee note); *DeLong Corp. v. Raymond International, Inc.*, 622 F.2d 1135, 1142 (3d Cir. 1980) ("if [defendant] submits evidentiary material which indicates that there is 'no genuine issue of material fact,' " it "becomes the responsibility of the opposing party to introduce its own evidentiary material"); *Terry's Floor Fashions v. Burlington Industries*, 763 F.2d 604, 610 (4th Cir. 1985) ("the burden is on the



tises on federal procedure acknowledge the rule as well.[31] *Moore's Federal Practice* ¶ 56.04, at 56-74 ("if a defend-

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plaintiff to produce evidence of an alleged conspiracy when the defendant has produced evidence conclusively showing that the facts on which the plaintiff relies . . . are not susceptible of the interpretation which plaintiff attempts to give them"); *Impossible Electronics Techniques v. Wackenhut Protective Systems*, 669 F.2d 1026, 1031 (5th Cir. 1982) ("the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly carried its burden"); *McDonnell v. Michigan Chapter # 10, American Institute of Real Estate Appraisers*, 587 F.2d 7, 9 (6th Cir. 1978) ("Until the deficiencies of the defendants' affidavits are remedied, [the plaintiff] is not required by Rule 56 to supplement his pleadings with 'significant probative evidence' that his allegations are true."); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1222 (7th Cir. 1984) ("defendant did not discharge its burden of showing that no genuine issue of material fact exists . . . ; therefore plaintiff should not be penalized for failure to attach an affidavit in his response"); *Brown v. Trans World Airlines*, 746 F.2d 1354, 1358 (8th Cir. 1984) ("To be entitled to summary judgment, [defendants] were required to show, *by admissible evidence*, that there is no genuine issue . . . .") (emphasis added); *ALW, Inc. v. United Air Lines, Inc.*, 510 F.2d 52, 55 (9th Cir. 1975) ("Once the allegations of conspiracy made in the complaint are rebutted by probative evidence . . . if the plaintiff then fails to come forward with specific factual support of its allegations . . . summary judgment for the defendant becomes proper."); *Bankers Trust Co. v. Transamerica Title Insurance Co.*, 594 F.2d 231, 235 (10th Cir. 1979) ("When a motion for summary judgment is made and supported by depositions and documents, . . . the adverse party may not rest upon the mere allegations . . . ."); *Clemons v. Dougherty County*, 684 F.2d 1365, 1369 (11th Cir. 1982) ("the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence").

[31] To be sure, as Judge Bork noted in dissent, J.A. 239, Rule 56 does specifically authorize a party to move for summary judgment "with *or without* supporting affidavits." Fed. R. Civ. P. 56(a), (b) (emphasis added). But this does not mean, as he suggested, that such an unsupported motion can force the nonmoving party to produce admissible evidence. If a motion is made "on the basis of the pleadings alone," it becomes "functionally the same as a motion

ant moves for summary judgment . . . he has the burden of clearly establishing the lack of any triable issue of fact *and must take the initiative of marshalling a record so showing*") (emphasis added); *see also id.* ¶ 56.15[3], at 56-480; 10A C. Wright, A. Miller & M. Kane, *supra*, § 2727, at 131, 143 ("The party moving for summary judgment cannot sustain his burden merely by denying the allegations in the opponent's pleadings.")[32]

The reasons for requiring such an initial showing are not difficult to discern. They stem from the fundamental premise that any litigant who pleads a legally valid claim or defense has a right to have that claim or defense tried, absent a showing that is sufficient to call into question the substantiality of his factual case.[33] That right

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to dismiss for failure to state a claim or for a judgment on the pleadings." 10 C. Wright, A. Miller & M. Kane, *supra*, § 2713, at 594. In such a case, "the movant admits the truth of his adversary's well-pleaded allegations but denies their sufficiency as a matter of law." *Moore's Federal Practice* ¶ 56.11, at 56-198. In order to "pierce the pleading allegations," by contrast, the movant must offer some *evidence* that contradicts them. *Id.* at 56-199.

[32] The two main law review articles cited by petitioner also recognize that the present federal rule requires as evidentiary showing by the moving party. *See* Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. Chi. L. Rev. 72, 77-79 (1977); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745, 749-50 (1974). Moreover, one of these commentators argues for a retention of this requirement in every case, albeit in a somewhat less stringent form in cases where the moving party would not have the burden of proof at trial. *Ibid.*

[33] Thus, in *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 620-22 (1973), the Court did uphold an *administrative* procedure requiring every party seeking approval of a new drug first to submit a full-blown written presentation of relevant studies and data as a condition of avoiding a summary denial of the claim. But in so doing, the Court was careful to state that if "this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment." *Id.* at 621-22. The Court then noted that "[u]nder the



would be burdened significantly if litigants were routinely required first to go to the trouble and expense of producing affidavits, depositions and the like in order to convince the court that they have a substantial case. Until a contrary showing is made, the representations of counsel about the witnesses and evidence he has ready for trial should be enough to preserve a party's right to a full hearing.[34]

In the instant case, respondent (1) pleaded a valid claim, (2) listed a person with direct knowledge as a trial witness, and (3) identified the sales records supplied by Celotex as documents that substantiated the witness's proposed testimony. Having done all this, she certainly had no obligation to come forward with any kind of evidence to defeat petitioner's wholly unsupported motion for summary judgment. Yet she chose to do more—submitting three documents that corroborated the allegations she planned to prove at trial. In a sense, it was the generosity of this response that caused respondent trouble in this case, since it somehow led the court to focus on the "admissibility" of these documents themselves. But this perverse chain of events hardly provides a valid basis for the district court's conclusion that respondent had failed to meet a burden imposed on her by Rule 56.

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Rules of Civil Procedure the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact." *Id.* at 622 n. 18.

[34] Judge Bork suggested below that, in some cases, the court itself may grant summary judgment *sua sponte* if it first gives the party adequate notice and an opportunity to show the existence of material factual disputes. But whatever the power of the court to issue a pretrial demand for substantiating evidence in an unusual case where it has reason to suspect a litigant's good faith, it is quite another matter to argue that *defendants* should have the power to demand an admissible evidentiary showing routinely in every case.

### B. Petitioner Has Presented No Valid Argument for an Exception to the Usual Rule in this Case.

Petitioner offers two arguments for recognition of an exception to the prevailing rule. Neither argument is substantial.

#### 1. *The Burden-of-Proof Argument.*

First, petitioner points to the fact that the moving party here was a defendant, who would not bear the burden of proof at trial. Pet. Br. 16. Based on this fact, Celotex suggests that it is only fair to expect the party who bears the trial burden to be the party that comes forward with evidence first at the summary judgment stage. This argument does not withstand analysis. To begin with, it simply ignores the governing law. It is well-established that even when the party seeking summary judgment would not have the burden of proof at trial, he still must make a prima facie evidentiary showing before shifting the burden of producing admissible evidence to his opponent. *Moore's Federal Practice* ¶ 56.15[3], at 56-480.[35] Indeed, all of the principal cases cited in this brief—including *Adickes* and every case cited in note 30 *supra*—involved summary judgment motions by *defendants*, who were nevertheless required to include a sufficient evidentiary showing in their summary judgment papers.

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[35] As Professor Moore puts it:

> The operation [of the directed verdict and summary judgment rules] is . . . somewhat different where the motions are made by the opponent of the party with the trial burden. . . . On motion for directed verdict the party resisting the motion, *i.e.*, the plaintiff, has had to and has presented his evidence, which is then scrutinized by the motion. *On motion for summary judgment by a defendant on the ground that plaintiff has no valid claim, the defendant, as the moving party, has the burden of producing evidence, of the necessary certitude, which negatives the opposing party's (plaintiff's) claim.*

*Id.* (emphasis added).



Even if the law were not so clear, there would be no justification for petitioner's suggestion that the trial burden of proof should control at the summary judgment stage. Petitioner's argument is based on a confusion of two quite different matters: (1) the obligation of the plaintiff in every case to identify the evidence he plans to use at trial, and (2) the obligation of a plaintiff, when responding to a valid summary judgment motion, to put this evidence in admissible documentary form. It is always reasonable to expect the party bearing the burden of proof at trial to *identify*—after a suitable period for discovery—the witnesses and other evidence that he intends to use to prove each key element of his claim. There is no reason, however, to impose a further burden on plaintiffs to present this evidence in every case in "admissible" form.[36] Instead, it is quite appropriate to require the first evidentiary showing from the party seeking to cut short the proceedings and deny his opponent a full hearing—*i.e.*, the party moving for summary judgment.

#### 2. *Petitioner's Lack of "Access" to the Relevant Facts.*

The second argument raised by petitioner is that a defendant should be able to file an unsupported motion in a case where it is unable to prove its innocence because it lacks sufficient access to the evidence needed to "prove a

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[36] This distinction was entirely overlooked by Judge Bork in his dissent below. He stated that "[t]his case is just like one in which, after discovery, the judge holds a pre-trial conference, asks the plaintiff how he intends to prove each element of his case, and learns that the plaintiff has no admissible evidence of an indispensable element of that case." J.A. 241. In fact, however, respondent here plainly did indicate that she had admissible evidence—including a witness—available for use at trial. The pretrial conference analogy hardly can support some further duty on her part to substantiate this prospective case through affidavits. No court, to our knoweldge, requires a party to produce affidavits at a pretrial conference indicating what his witnesses will say.

negative."[37] This argument, however, is based on a misunderstanding of what it means to require the moving party to make an evidentiary showing. "There are essentially two methods by which the moving party can discharge his burden." Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745, 750 (1974). In some cases, a defendant can simply submit an affidavit by a witness with personal knowledge of the facts, denying the factual basis of the plaintiff's claim. But in other cases, as petitioner suggests, this may not be possible. An asbestos company, for example, may not know which of its products were ever used by a given individual. Nevertheless, there is still a way for such a defendant to make the requisite showing. "[T]hrough discovery he can obtain a preview of his opponent's evidence on an essential element and contend, in support of his motion, that the evidence is insufficient to discharge the opponent's production burden." *Id.* *See also* 6 *Moore's Federal Practice* ¶ 56.15[5].

In other words, even where the defendant lacks access to direct evidence to refute a plaintiff's claim, he can use discovery to force the plaintiff to reveal the facts and evidence on which he plans to rely at trial. This information, in turn, can provide the basis for a proper motion for summary judgment. In some cases, the defendant can simply rely on the plaintiff's response and argue that the plaintiff's proposed trial evidence is insufficient to prove the case as a matter of law. In other cases, he may choose to depose the plaintiff's witnesses to test their actual knowledge of the relevant facts. Or he may be able to respond to the plaintiff's prospective case with affidavits or documents of his own that undermine the purported significance of the plaintiff's evidence.

[37] Pet. Br. 22. *See also* Pet. Br. 13 ("It is of course impossible for any defendant in the position of Celotex to provide such proof—which would logically require an accounting of each day of decedent's career.").



When such a showing is made, the burden shifts to the plaintiff to reduce his evidence to admissible form, and demonstrate to the court that it is sufficient, as a matter of law, to create a triable issue of fact. Thus, in *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968), the defendant had prevailed on a motion for summary judgment by determining through depositions what circumstantial evidence the plaintiff intended to use to prove his case, and then supplying affidavits which "conclusively showed that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them." *Id.* at 289. This Court affirmed, holding that the plaintiff could not, in the face of an evidentiary attack on his own prospective case, rely simply on the defendant's failure to *disprove* its liability conclusively. *Id.*

Here, by contrast, petitioner made no effort whatever to contest the significance of the evidence that respondent had outlined for potential use at trial. It attempts now to excuse this failure by arguing that it could not do more because respondent never gave it the requisite "preview" of her trial case in answers to interrogatories.[38] But this argument ignores the substance of what occurred below. Well before the dispositive summary judgment motion was filed, respondent had revealed the details of her case against Celotex by submitting the two letters and the deposition transcript in conjunction with her opposition to an earlier summary judgment motion that was later withdrawn. J.A. 160-64L. The parties then proceeded with these facts in mind. Petitioner, for example, moved for a change of venue to Chicago based on the fact that respondent's allegations of exposure involved an Illinois company. Thus, even if respondent should have put more of these specifics into her formal interrogatory responses, there is no doubt that petitioner had more than enough

[38] Pet. Br. 21.

notice of what she planned to prove at trial to allow it to investigate respondent's case and prepare a contrary evidentiary showing.

Indeed, the record makes clear that Celotex did begin such an investigation here. First, it searched its own records to see if they reflected sales to Anning-Johnson, and found numerous sales records. Next, petitioner tried to put together evidence to show that the products used by the decedent were "enclosed" so that there was no real exposure to asbestos fibers. *See* p. 5, *supra*. But this effort apparently led nowhere. Ultimately, Celotex filed its motion for summary judgment without submitting any kind of a defense through affidavits, and without even trying the most obvious means of testing respondent's case—*i.e.*, deposing her key witness concerning the decedent's exposure at Anning-Johnson.[39]

In any event, even if petitioner did have a valid complaint about the incompleteness of respondent's answers to interrogatories, the proper response was to file a motion to compel and, eventually, to seek the sanctions provided for in such cases. *See* Fed. R. Civ. P. 37. Faced with such a motion to compel, the court could have used its discretion to set appropriate deadlines for respondent to complete her description of the pertinent facts and witnesses as requested by the defendants, or it could have considered other appropriate actions.[40] Clearly, in a case

[39] To be sure, even without Mr. Hoff as a witness, we would argue that the existence of a triable issue of fact could have been established solely on the basis of the sales records indicating that a Celotex predecessor corporation had sold asbestos insulation products to the company where the decedent worked.

[40] As we noted above, a motion to compel was filed in this case by all the defendants immediately after respondent submitted her first response to the defendants' joint interrogatories. J.A. 64. The court never ruled on this motion, however, apparently because it began almost immediately granting summary judgment to various defendants whenever respondent could not produce specific evidence of the decedent's exposure to their products.



where the discovery period set by the court has expired and a plaintiff still cannot point to any evidence that will be used at trial, a dismissal or summary judgment becomes appropriate.[41] In the present case, by contrast, petitioner filed its unsupported motion before the close of discovery, in the apparent hope that respondent might not respond with evidence in admissible form. In so doing, it overlooked its own duty to come forward first with an evidentiary showing sufficient to call into question the validity of the plaintiff's prospective case.

## CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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[41] Indeed, that is essentially how asbestos cases are routinely handled now in many federal courts. The court enters a pretrial order specifying a period of discovery, after which the plaintiff is required to submit a filing identifying the witnesses he intends to use to establish exposure to each of the defendants' products. The defendants are then given a fixed period of time in which to depose these witnesses. Where the plaintiff is unable to identify witnesses with respect to a given defendant, that defendant is dismissed from the case. *See generally Rabb v. Amatex Corp.*, 769 F.2d 996 (4th Cir. 1985); *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984). But even in these situations, the plaintiff need only identify the witnesses, not produce affidavits from them, unless the defendant makes an evidentiary showing sufficient to call into question the case that the plaintiff has outlined for trial.

# APPENDIX

**CAREY - CANADIAN ASBESTOS**
A DIVISION OF PANACON CORPORATION
MAIL REMITTANCES TO: BOX 910 CAREY POST OFFICE, QUEBEC, CANADA

REFERENCE NUMBER: 780-39811 | ORDER NO. | 06 | 23 | 71 INVOICE DATE | B. O.

| CUSTOMER CODE | STATE | COUNTY | SALESMAN | TERMS |
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| 0400002 | 12 | 031 | 909 | 5 |

SOLD TO: Anning Johnston Company
1959 Anson D river
Melrose Park Ill. 60160

SHIP TO: M&I: 298 Anning Johnston Company
c/o CNA Office Building
Wabash & Van Buren
Chicago, Ill.

DATE ENTERED: 6-23-71
DATE ACKNOWLEDGED AT DESTINATION:
REQ. SHIPPED DATE:
DATE SHIPPED: 6-23-71

CUST. ORDER NO.: Rel: 1 | DATE OF ORDER: | SALESMAN'S NAME: Compton

SHIP VIA: RAIL | TRUCK | F.O.B. MINE

ROUTED: QUEBEC CENTRAL - Beauce Express / Yellow Truck Line | COLLECT | PREPAID | FROM: Minos

CAR IDENTIFICATION: Yellow Van 430.

| TONS | QUANTITY ORDERED: TYPE PACKAGE | NO. PACKAGES | PRODUCT: NAME | GRADE | QUANTITY SHIPPED: PACKAGES | TONS | PRICE PER TON | EXTENSION |
|---|---|---|---|---|---|---|---|---|
| 20.00 | L.F. Paper 63# | 635 | 27595-03 | Firebar | 635 | 20.00 | 193.25 | 3866 50 |
| | With label F | | | | | | | |

Customs clearance by J.W. Carr, Detroit, Mich.

RECEIVED
JUN 28 1971
ANNING-JOHNSON CO., INC.
SALES DEPT.
MELROSE PARK, ILL.

Dup Invoice
F 1004
Entered 7/15

CAREY-CANADIAN ASBESTOS FIBRE

TERMS: 1% 10 DAYS
NET-30 DAYS
NO DISCOUNT ALLOWED ON FREIGHT

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| | TOTAL INVOICE | 3866 50 |
| PLUS | FREIGHT LBS. CWT. | |
| PLUS | Dusty, Bookings and Ent charges | 86 30 |
| PLUS | | |
| PLUS | % FREIGHT SURCHARGE | |
| PLUS | | |
| PLUS | | |
| PLUS | | |
| PLUS | | |
| | TOTAL INVOICE - CANADIAN FUNDS | 3952 80 |
| | TOTAL INVOICE - U.S. EQUIVALENT @ 9828 U.S. | 3884 02 |

CASH CANADIAN FUNDS $
CHQ. U.S. FUNDS $
ACCOUNT DOLLARS

Pd/MBP 3800.92

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# REPLY

# BRIEF

No. 85-198

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

THE CELOTEX CORPORATION,

*Petitioner,*

v.

MYRTLE NELL CATRETT, ADMINISTRATRIX OF THE ESTATE OF LOUIS H. CATRETT, DECEASED,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF FOR PETITIONER

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### I. CELOTEX SATISFIED ITS LIMITED BURDEN BY SHOWING THAT PLAINTIFF HAD FAILED TO PRODUCE ANY EVIDENCE OF DECEDENT'S EXPOSURE TO CELOTEX PRODUCTS.

Respondent's arguments concerning the showing made by Celotex in support of its motion for summary judgment consistently seek to obfuscate the chronology of discovery in the trial court. Respondent filed her Complaint on September 2, 1980. After some earlier discovery requests by various parties, including Celotex, the defendants filed a joint set of interrogatories on February 13, 1981. These

interrogatories included requests for specific information on decedent's exposure to asbestos-containing products.

When the interrogatories were finally answered on June 29, 1981, the answers contained no exposure information; instead, plaintiff promised to supplement her answers with the requested information (J.A. 59-60). On December 23, 1981, when Celotex renewed its motion for summary judgment, plaintiff still had not supplemented her answers to interrogatories — a failure which Celotex's motion specifically pointed out (J.A. 171-72). Plaintiff finally filed supplemental answers to interrogatories on February 1, 1982, but still provided no indication whatsoever of exposure by decedent to Celotex products (J.A. 200-03). As of July 21, 1982, when the trial court granted Celotex's motion, plaintiff still had not responded to interrogatories in any manner indicating exposure by decedent to Celotex products.

In the recent case of *Fontenot v. Upjohn Company*, 780 F.2d 1190 (5th Cir. 1986), the Fifth Circuit affirmed the district court's grant of summary judgment to the defendant, a drug manufacturer, and expressly endorsed the position taken by Judge Bork in the dissent below. 780 F.2d at 1197. The Fifth Circuit granted summary judgment because the plaintiff "after seven months of time for discovery . . .," had not produced any evidence that the drug manufactured by Upjohn was capable of causing the heart defects suffered by the plaintiff's two children. *Id.* The motion was granted even though Upjohn did not produce affidavits or other evidentiary material negating the possibility of causation. *Id.* at 1193.

In its interpretation of the requirements under Rule 56 of a party who does not have the ultimate burden of proof at trial, the Fifth Circuit stated:

> If, however, it is evident that the party seeking summary judgment against one who bears the proof burden has no access to evidence of disproof, and ample time has been allowed for discovery, he should be permitted, as Upjohn did here, to rely upon the complete absence of proof of an essential element of the other party's case.



The significance of this proposition to litigants and trial courts is set forth in the following statements by Judge Bork in his dissent:

> The majority's decision in this case undermines the traditional authority of trial judges to grant summary judgment in meritless cases. Even though the plaintiff has *no* admissible evidence on an essential element of her case, the majority today allows her to survive a motion for summary judgment. This decision will probably lead to an unnecessary trial followed by a directed verdict for defendant Celotex. More generally, the precedent established today will waste trial court time and energy and unnecessarily add to the costs and procedural burdens faced by litigants. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 187 (J.A. 233).

As the Fifth Circuit in *Fontenot* pointed out, even excluding counsel fees, the public cost of the average jury trial in federal court is more than $7,000.00. *Id.* at 1195, n.10. There are strong public policy grounds for interpreting Rule 56 in such a fashion as to make the burden of proof on a motion for summary judgment consistent with the burden of proof at trial. The importance of placing the burden of proof on a motion for summary judgment upon the party who will have the burden of proof at trial was also explained by Judge William Schwarzer in *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1982).

The factual situation in the present case furnished even stronger justification for a summary judgment than did the facts in *Fontenot*. In the present case, the plaintiff had over twenty-two months for discovery when the trial court

ruled on Celotex's motion for summary judgment. The joint defense interrogatories requesting information on product exposure had been outstanding for more than seventeen months. Furthermore, unlike the plaintiff in *Fontenot* who sought more time for discovery, Respondent did not request additional time for discovery from the trial court.

Celotex, in the papers supporting its motion for summary judgment, specifically called the trial court's attention to Respondent's long-continued failure to respond to any of the discovery requests designed to identify evidence concerning decedent's exposure history (J.A. 171-72). If such a showing is insufficient to require a plaintiff to demonstrate that she has admissible evidence with which to survive a motion for directed verdict, then the result will inevitably be to require that cases proceed to trial in circumstances where the lack of admissible evidence of an essential element of plaintiff's case will require a directed verdict. As has been repeatedly pointed out by the academic commentators, and as was recognized by the Fifth Circuit and by Judge Bork's dissent below, there can be no public policy justification for such a result. *See, e.g., Fontenot v. Upjohn Company, supra; Catrett v. Johns-Manville Sales Corp., supra;* Currie, *Thoughts on Directed Verdicts and Summary Judgments,* 45 U. Chi. L. Rev. 72 (1977); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 Yale L. J. 745, 752 (1974); Pielemeier, *Summary Judgment in Minnesota: A Search for Patterns,* 7 Wm. Mitchell L. Rev. 147, 158-59 (1981); Louis, *Summary Judgment and the Actual Malice Controversy In Constitutional Defamation Cases,* 57 S. Cal. L. Rev. 707, 716-17 (1984); American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation,* 90 F.R.D. 207, 229-31 (1981).



As was stated in the dissent below, the trial court may grant summary judgment *sua sponte* if it is satisfied that no genuine issue of material fact is present and if notice is given. 756 F.2d at 189 (J.A. 237). In the case of a *sua sponte* grant of summary judgment, there is obviously no supporting material other than the court's review of the record. Respondent acknowledges that the trial court has the power to grant summary judgment *sua sponte,* but argues that if a motion for summary judgment is made by a party, then the trial court's review of the record is an insufficient basis for summary judgment. *Resp. Br.* 23, n.34. As Judge Bork pointed out, it is illogical to hold that a trial judge is "stripped of his power to act solely because the defendant Celotex filed an unsupported motion." 756 F.2d at 189 (J.A. 238, n.6).

It is respectfully submitted that Celotex adequately supported its motion for summary judgment by pointing out plaintiff's failure to respond to discovery requests in a manner indicating any exposure of decedent to Celotex products. The inquiry then properly shifted to whether plaintiff made a sufficient showing to defeat the motion.

## II. RESPONDENT MADE NO SHOWING THAT SHE HAD ANY ADMISSIBLE EVIDENCE WHICH COULD PREVENT A DIRECTED VERDICT.

Respondent strenuously argues that she "plainly did indicate that she had admissible evidence — including a witness — available for use at trial." *Resp. Br.* 25, n.36. She then argues that it was only because her evidence was not presented to the trial court in admissible *form* that Celotex's motion for summary judgment was granted.

In fact, however, it was not only the *form* of Respondent's showing which was deficient. She completely failed to produce any indication that she could produce admissible evidence at the time of trial which would permit her to survive a directed verdict. The only "evidence" to

which Respondent points is, first, an unsworn letter from a person who did not purport to have any personal knowledge that decedent was exposed to Celotex products and, second, invoices indicating that "Carey-Canadian Asbestos" had made certain sales to one of decedent's employers.

Respondent acknowledges in her brief that she is not pressing the argument that decedent's deposition would be admissible either at trial or for purposes of a summary judgment motion. *Resp. Br.* 12, n.17. Moreover, Respondent has not pressed her argument that the letter to her attorney from a representative of decedent's employer's insurer has any probative value. Respondent's contention is thus that two documents — the letter from Mr. Hoff, the Assistant Secretary of one of decedent's employers (J.A. 197-98) and the invoice showing a shipment of Firebar from Carey-Canadian Asbestos to decedent's employer (*Resp. Br.*, App. 1a) — are sufficient to permit her to defeat Celotex's motion for summary judgment.

Respondent concedes that none of her evidence was admissible. *Resp. Br.* 12, n.17. Nor does she question the authority of the cases cited in Celotex's initial brief which held that a summary judgment motion may only be opposed with affidavits or other evidence which would be admissible at trial. She argues, however, without citing any authority to support her position, that her failure to produce admissible evidence should be excused on the basis that she somehow demonstrated that she would be able to produce admissible evidence at trial.

In fact, however, neither the letter of Mr. Hoff nor the Carey-Canadian Asbestos invoice provide any indication that Respondent's case could survive a motion for directed verdict. Not only is Mr. Hoff's letter not under oath, it does not even purport to be based upon personal knowledge. In fact, its references to what "we understand" and



"our understanding" would appear to strongly suggest that it is *not* based upon personal knowledge.

The invoice from Carey-Canadian Asbestos similarly fails to show that decedent was exposed to a Celotex product. First, the appellate courts have repeatedly held that the fact that a manufacturer of asbestos-containing products has sold products to a plaintiff's employer is insufficient to support an inference that the plaintiff was exposed to the products. *See, e.g., Blackston v. Shook and Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985); and *Lohrmann v. Pittsburgh Corning Corp., et al.*, 782 F.2d 1156, 1161-64 (4th Cir. 1986). Furthermore, Respondent produced no evidence whatever that Celotex could be held liable as a result of sales by Carey-Canadian Asbestos.[1]

In short, Respondent's opposition to Celotex's motion for summary judgment was deficient in both form and substance. Despite having had nearly two years to discover admissible evidence to establish Celotex's liability, Respondent utterly failed to demonstrate that her evidence would be sufficient to survive a motion for directed verdict at the time of trial. Under the circumstances, it was appropriate for the trial court to grant Celotex's motion for summary judgment.

[1] Respondent attempts to excuse this failure by urging that Celotex did not demonstrate its lack of liability for products sold by Carey-Canadian Asbestos. This ignores the fact that Respondent would have to *prove* Celotex's liability at trial — something which there is no indication she could do. Respondent has not denied Celotex's assertion that it has *never* been held liable as a result of products sold by Carey-Canadian Asbestos.

## CONCLUSION

For the reasons set forth above, Petitioner respectfully urges that this Court reverse the judgment of the Court of Appeals and reinstate the judgment of the District Court.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

MOTION FILED
DEC 23 1985

(3)

No. 85-198

# In the Supreme Court of the United States

OCTOBER TERM, 1985

THE CELOTEX CORPORATION, PETITIONER

*v.*

MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION AND THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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# In the Supreme Court of the United States

OCTOBER TERM, 1985

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THE CELOTEX CORPORATION, PETITIONER

*v.*

MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and the Product Liability Advisory Council ("PLAC") respectfully move, pursuant to Rule 36.3 of the Rules of this Court, for leave to file a brief *amicus curiae* in this case in support of petitioner. The consent of counsel for petitioner has been granted; the consent of counsel for respondent has been withheld. The correspondence pertaining to consent has been lodged with the Clerk of this Court.

The MVMA is a trade organization whose member companies build over ninety-nine percent of all motor vehicles produced in the United States.* In addition, its members manufacture farm and industrial equipment, lawn and garden tractors, construction and mining machinery, locomotives, rail-

* MVMA members are: AM General Corporation; American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Mfg., Inc.; International Harvester Company; M.A.N. Truck & Bus Corporation; PACCAR, Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

road rolling stock, winches, and gasoline and diesel engines for numerous industrial and agricultural uses.

The PLAC is a nonprofit corporation whose members are engaged in various lines of commerce.* The MVMA was instrumental in the formation of the PLAC and is one of its members. The principal purpose of the PLAC is to submit briefs, as friend of the court, in appellate cases involving important issues affecting the law of product liability.

Members of the MVMA and PLAC frequently are named as defendants in lawsuits commenced in federal district courts. Many of those cases, filed under the liberal notice pleading requirements of the federal rules, prove to be meritless after the parties conduct pre-trial discovery. Motions for summary judgment are particularly important in such cases; they serve to promote prompt disposition of meritless litigation which imposes unnecessary financial burdens on business firms and interferes with the efficient conduct of their activities. Summary judgment procedures also are important to the efficient conduct of judicial business, and serve to protect all litigants against unnecessary burden and expense.

Restrictive pronouncements from the federal courts of appeals, however, have served to chill the application of Fed. R. Civ. P. 56 and to discourage the grant of summary judgment in cases that imperatively call for that disposition. The case at hand exemplifies this problem. The panel majority has held that summary judgment may not be granted even though the defendant has established that the plaintiff possesses no admis-

* PLAC members are: American Honda Motor Company, Inc.; Black & Decker Company; The Budd Company; Clark Equipment Company; FMC Corporation; The Firestone Tire & Rubber Company; Fruehauf Corporation; Great Dane Trailers Inc.; Motor Vehicle Manufacturers Association of the United States, Inc.; Nissan Motor Corporation; Porsche Cars North America, Inc.; Saab-Scania of America, Inc.; Subaru of America, Inc.; and Toyota Motor Sales, U.S.A., Inc.



sible evidence tending to prove that the defendant's product caused the injury at issue. The panel majority disapproved summary judgment because the movant did not affirmatively demonstrate the absence of causation.

The holding of the panel majority clashes with the language and purpose of Rule 56 and threatens to generate substantial confusion concerning the administration of that Rule. District courts faced with this precedent will be led to apply Rule 56 in a rigid and formalistic manner which will protract litigation and impose financial burdens on parties who are entitled to summary disposition of meritless claims.

Members of the MVMA and PLAC have a direct and substantial interest in urging this Court to overturn a precedent which will obstruct the proper application of Rule 56 and impose significant burdens on them. In view of their extensive litigation experience in federal district courts across the country, they also are in a position to advise this Court of important practical considerations bearing on the interpretation of Rule 56 and to explain how its construction affects members of the public apart from the immediate parties to this case. Accordingly, the views of the MVMA and PLAC should materially assist the Court and provide a useful supplement to the presentation of the parties.

Respectfully submitted.

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## QUESTION PRESENTED

Whether a motion for summary judgment, which is filed after many months of discovery, and which establishes that the plaintiff possesses no admissible evidence to prove an essential element of her cause of action, may properly be granted even though the movant does not also introduce affirmative evidence disproving that element.



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# In the Supreme Court of the United States

OCTOBER TERM, 1985

**No. 85-198**

THE CELOTEX CORPORATION, PETITIONER

*v.*

MYRTLE NELL CATRETT, Administratrix of the Estate of Louis H. Catrett, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION AND THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

## INTEREST OF THE *AMICI CURIAE*

As explained in the foregoing motion for leave to file this *amicus curiae* brief, members of the MVMA and PLAC engage in business in all fifty states and in the District of Columbia, and are subject to litigation in district courts across the nation. Proper application of summary judgment procedures to resolve meritless litigation is of enormous importance to members of the MVMA and PLAC.

If cases in which the plaintiff possesses no admissible evidence must nonetheless lumber forward to a trial on the merits, members of the MVMA and PLAC will be exposed to substantially increased expense in defending themselves. In addition, their ordinary business operations will be disrupted by the need to prepare a wholly unnecessary defense. Accord-

ingly, members of the MVMA and PLAC have a direct and substantial interest in urging reversal of the decision of the court of appeals. As we demonstrate in this brief, that interest coincides with the general public interest in efficient judicial administration.

## STATEMENT

1. Plaintiff Myrtle Nell Catrett filed suit in September 1980, alleging that the death of her husband had resulted from exposure to asbestos products manufactured or distributed by fifteen corporations. The complaint named Celotex Corporation as one of the defendants. Pet. App. 3a. Following the filing of answers to the complaint, the parties engaged in pretrial discovery, including an exchange of documents and responses to several sets of interrogatories. J.A. 21-23, 24-63, 84-132, 168-169, 178-180, 193-194, 200-209.

More than one year after the filing of the complaint, defendant Celotex filed a motion for summary judgment. J.A. 73-83. Celotex later withdrew that motion (*id.* at 167) but filed a renewed motion which presented the same contentions in support of summary judgment. That motion was accompanied by a statement of facts and a memorandum of points and authorities. *Id.* at 170-176.

In its memorandum, Celotex relied on the pleadings and on plaintiff's response to interrogatories. J.A. 171-172, 173-176; see also *id.* at 73-74. Celotex maintained that plaintiff's inability to identify the brand of asbestos products her husband had used in his employment, as revealed by her interrogatory response, showed a fatal lack of evidence proving contact with any Celotex product. Accordingly, Celotex contended, there was no evidence tending to prove causation, an essential element of plaintiff's cause of action. *Id.* at 174-175.

In an attempt to show the existence of a genuine dispute on the issue of causation, plaintiff submitted three exhibits, two of



which were letters from third parties and one of which was a deposition of her deceased husband taken in an unrelated proceeding. J.A. 188-190, 195-197, 164. She argued that "[t]hese documents clearly establish that plaintiff's deceased husband was exposed to an asbestos product of defendant . . . ." J.A. 188-189; Pet. App. 5a.

2. In July 1982, the district court conducted a hearing on the summary judgment motion and examined the parties about the state of the record. Pet. App. 23a-29a, 41a-42a. During that hearing, counsel for Celotex contended that summary judgment was warranted based on "the plaintiff's own documents, its own response to the Celotex inquiry, as well as the master set of interrogatories." Pet. App. 24a. With reference to the letters and deposition tendered by plaintiff, counsel for Celotex contended that such materials were not "admissible" because they were hearsay; he also contended that plaintiff had failed to present any "affidavit" showing the existence of a witness who could provide admissible testimony as required by Rule 56 to oppose a motion for summary judgment. *Id.* at 25a.

During the summary judgment hearing, counsel for plaintiff relied exclusively on the exhibits it had tendered to the district court. Pet. App. 27a. Counsel did not offer the court any affidavit from any witness who was prepared to testify on the issue of causation. Nor did counsel request any additional time to obtain such an affidavit or to locate other admissible evidence establishing the existence of a triable issue of fact. *Ibid.*

At the conclusion of the summary judgment hearing, the district court ruled that it would "grant the defendant Celotex's motion for summary judgment, there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." Pet. App. 29a. In its summary judgment order, the district court expressly stated that its ruling was based "upon consideration of the entire record herein." J.A. 218.

3. A majority of the panel of the court of appeals reversed, concluding that "defendant's moving papers were patently defective on their face." Pet. App. 5a. The panel stated that "Celotex offered no affidavits, declarations, or evidence of any sort whatever in support of its summary judgment motion. To the contrary, Celotex's motion was based solely on the plaintiff's purported failure to produce credible evidence to support her claim." *Id.* at 6a.

In reaching this result, the panel relied on prior cases which stated the general principle that the moving party has "the burden of showing there is no genuine issue of material fact." Pet. App. 7a n. 10. The panel believed that this "burden" could not be discharged by showing the plaintiff's lack of evidence, but instead required affirmative evidence from the defendant "proving the negative"—*i.e.*, proving that defendant's product could not have caused the injury at issue. *Id.* at 6a; 10a n. 15.

The panel recognized the "salutary principle" that a district court may grant summary judgment *sua sponte* when there is no triable issue without insisting "that the lack of a factual dispute be affirmatively demonstrated by the moving party." Pet. App. 12a. Even though the panel recognized that the court could grant summary judgment *sua sponte* without any showing by a moving party, it nonetheless concluded that summary judgment must be reversed in this case because a motion had been made which was insufficiently supported. *Ibid.*

The panel reached these conclusions despite its agreement that plaintiff was not entitled to "more time to produce admissible evidence." It stated that if Celotex had sufficiently "supported" its motion for summary judgment, "we would agree that the inadmissibility of Mrs. Catrett's evidence would be fatal to her opposition to the motion." Pet. App. 13a.

4. Judge Bork dissented from the panel's decision. He explained that the panel's insistence that a case be brought to



trial even though the plaintiff possesses no admissible evidence "will waste trial court time and energy and unnecessarily add to the costs and procedural burdens faced by litigants." Pet. App. 13a. He concluded that summary judgment should be awarded "where, as here, the plaintiff has had two years for discovery and knew that she was expected to show her evidence in response to defendant's claim that she had none." *Id.* at 14a.

Judge Bork explained that summary judgment was warranted because, if the present case went to trial, the defendant would be entitled to a directed verdict on the ground that "the plaintiff lacks any admissible evidence of causation, an essential element of her case." Pet. App. 15a. He also pointed out that because courts have the power to award summary judgment *sua sponte*, it is irrelevant whether the moving party has tendered sufficient supporting material. *Id.* at 17a.

Finally, Judge Bork emphasized that there is no unfairness in awarding summary judgment in this case. He noted that plaintiff had "almost two years to prepare her case for trial" and also received explicit notice from two motions for summary judgment "that Celotex claimed she had no evidence of causation." Pet. App. 21a. Under these circumstances, "the district judge clearly acted within his discretion in granting summary judgment without giving Mrs. Catrett an additional, *unrequested* opportunity to produce admissible evidence essential to her case." *Ibid.*; emphasis in original.

## SUMMARY OF ARGUMENT

### I.

Proper construction of Rule 56 of the Federal Rules of Civil Procedure must take account of the litigation context in which the rule operates. As members of this Court repeatedly have pointed out, federal district courts today face a staggering case load. And the cost of litigation has become unsupportable

for many members of the public. These conditions have led to serious concern that federal courts can no longer provide just, speedy, and inexpensive resolution of the cases brought before them.

This Court has pointed out, however, that litigation need not result in "administrative chaos" if district judges "exercise sound discretion and use the tools available." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979). Rule 56 is one of those vital tools. Operating in combination with cognate rules vesting district courts with discretion to expedite litigation and dispose of meritless claims, Rule 56 protects courts and parties from the burden of litigation when there is no genuine need for a trial.

Rule 56 will not, however, achieve its essential purpose if it is construed by appellate courts in a restrictive and grudging manner. Federal district courts already have received the impression that summary judgments are frowned on by the courts of appeals and are subject to unpredictable reversal. The decision of the court of appeals in this case sends that signal to district courts loudly and clearly, and is certain to chill the proper application of Rule 56.

## II.

The mission of summary judgment is to dispose of a case when there is no genuine issue of fact that justifies a trial. Accordingly, federal judges may enter judgment in favor of a defendant whenever they determine that there is a fatal defect in the plaintiff's evidence. This may be done *sua sponte* as well as on motion by the defendant. The adequacy of the motion for summary judgment in no way restricts or conditions the authority of the trial judge to make this determination.

In addition, a defendant seeking summary judgment is not obliged to meet technical standards. The defendant need not adduce affirmative evidence, but need only show that the plaintiff, who bears the burden of proof, lacks evidence on an



essential element of the cause of action. As Professors Wright, Miller and Kane have explained (10A *Federal Practice and Procedure* 130 (1983)): "the movant may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent."

This Court's decision in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), demonstrates the proper application of that principle. In *Cities Service*, this Court sustained a grant of summary judgment where the defendant showed that plaintiff's evidence was insufficient to justify a trial. This Court upheld summary judgment despite the plaintiff's argument that the defendant "never disproved" his allegations, explaining that the "absence of any significant probative evidence tending to support the complaint" warrants the grant of summary judgment. *Id.* at 289-290.

## III.

The panel majority's restrictive ruling in this case cannot be reconciled with the literal language of Rule 56. Although the panel characterized the summary judgment motion here at issue as "unsupported," in fact the motion was supported by responses to "interrogatories," "pleadings," and "admissions" made during the briefing and argument of the summary judgment motion. Rule 56 requires no more.

When a defendant seeking summary judgment uses such materials to establish that there is no admissible evidence warranting a trial, it is not necessary for the defendant to go further and "prove the negative"—*i.e.*, to affirmatively disprove the plaintiff's allegations. The plaintiff bears the burden of proof on each essential element of a cause of action; the defendant therefore sustains its burden of demonstration under Rule 56 by showing that the plaintiff has no competent evidence sufficient to establish the cause of action.

No consideration of fairness justifies the panel's reversal of summary judgment in this case. The plaintiff in this action had almost two years to engage in pretrial investigation and discovery in order to uncover competent evidence needed to support her complaint. She had ample notice that the sufficiency of her evidence was under challenge from the original and the renewed motions for summary judgment. At no time during the hearing on the motion for summary judgment did the plaintiff ask for additional time to tender admissible evidence or indicate that she was restricted in obtaining it. In these circumstances, the district court properly exercised its discretion by granting summary judgment. Any other disposition would have been inconsistent with the district court's duty to expedite litigation and avoid unnecessary expense.

## ARGUMENT

### THE COURT OF APPEALS SHOULD HAVE SUSTAINED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THE RECORD CONCLUSIVELY SHOWED THAT PLAINTIFF POSSESSED NO ADMISSIBLE EVIDENCE PROVING AN ESSENTIAL ELEMENT OF HER CAUSE OF ACTION

Fed. R. Civ. P. 56(c) states in unambiguous terms that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In the present case, the moving party showed, based on the pleadings, the responses to interrogatories, and plaintiff's own admissions during the summary judgment hearing, that plaintiff possessed no admissible evidence on an essential element of her cause of action. Since the burden of proof rested on plaintiff on the issue of causation, and since the defendant successfully demonstrated



that plaintiff possessed no admissible evidence on that issue, the district court properly entered summary judgment.

The court of appeals' erroneous ruling to the contrary will, as Judge Bork explained, "waste trial court time and energy" and add to the cost and burden of civil litigation at precisely the time when the judiciary requires greater flexibility in dealing with its staggering case load. This will hinder the fair administration of justice and defeat the mandate of Rule 1 of the Federal Rules of Civil Procedure, which provides that all of the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

### I. THE SUMMARY JUDGMENT PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE CONSTRUED TO PRESERVE THE AUTHORITY OF DISTRICT COURTS TO EFFICIENTLY MANAGE THEIR DOCKETS BY TERMINATING MERITLESS LITIGATION.

A. As Judge Bork explained in his dissenting opinion, the panel's ruling clashes with the goal of the federal rules to ensure efficient judicial administration and aggravates docket congestion. To expand on Judge Bork's observation, a word of background about the litigation explosion in federal court is in order. As Chief Justice Burger recently explained (*Isn't There A Better Way?*, 68 A.B.A.J. 274, 275 (1982)):

> "From 1940 to 1981 annual federal district court civil case filings increased from about 35,000 to 180,000. This almost doubled the yearly caseload per judgeship from 190 to 350 cases. The real meaning of these figures emerges when we see that federal civil cases increased almost six times as fast as our population."

This trend shows no sign of abatement. In comparison to the prior year, the number of civil cases filed in district courts in 1984 increased by 8%; the number of civil cases pending in

district courts for three years or more increased by 7.5%; and the number of cases requiring four days or more of trial time rose by almost 4%. *Annual Report of the Director of the Administrative Office of the United States Courts* 124, 129, 156, 190 (1984). Knowledgeable commentators have warned that the workload of federal judges "cannot be allowed to grow for long at the extraordinary rates of the past quarter-century without putting an end to the federal court system in its present form." R. Posner, *The Federal Courts* 93 (1985).

Numbers of cases, of course, tell only part of the story. Cases also are becoming increasingly complex, time-consuming, and expensive. "Both trends are cause for concern—and possibly alarm—when projected toward the twenty-first century." W. Burger, *Symposium, Reducing the Costs of Civil Litigation,* 37 Rutgers L. Rev. 217 (1985). As Justices Stewart, Powell, and Rehnquist observed when the Federal Rules of Civil Procedure were amended in 1980: "Delay and excessive expense now characterize a large percentage of all civil litigation .... The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims ... simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system." 85 F.R.D. 522-523.

Scholars estimate that in 1983 over $33 billion was spent on legal services, representing an increase in real terms of 58.6% in one decade. Levin and Colliers, *Containing the Cost of Litigation,* 37 Rutgers L. Rev. 219, 222 (1985). There also is evidence "that litigation costs may be increasing at a faster rate than overall legal services." *Id.* at 227. Those costs are not simply fees for lawyers. They also include "lost management time, the costs of delay and uncertainty, lost opportunities, and destroyed business relationships." *Id.* at 226. The staggering volume and complexity of civil litigation also imposes substantial social costs by increasing the burden on citizens selected for jury duty. Federal Judicial Center, *Protracted Civil Trials* 1 (1981).



B. The heavy case load faced by district courts need not, however, "result in administrative chaos" if "district courts exercise sound discretion and use the tools available." *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 345 (1979). The Federal Rules of Civil Procedure prescribe a comprehensive array of provisions designed to equip federal judges to cope with their dockets by disposing of meritless allegations with efficiency.

Rule 56, which authorizes summary judgment when there "is no genuine issue" of material fact, is central to that design. As Judge Schwarzer recently noted, "[s]ummary adjudication of claims or defenses is one of the means for implementing the fundamental policy of the Federal Rules stated in Rule 1: 'to secure the just, speedy and inexpensive determination of every action.'" *Summary Judgment Under The Federal Rules,* 99 F.R.D. 465. Rule 56 does not, of course, stand alone. It is "an integral part of the framework of the Rules, closely related to other provisions which are similarly intended to permit the early elimination of claims and defenses that the proponent cannot support." *Id.* at 465.

The thrust of the federal rules, as recently amended by this Court, is toward early, inexpensive, and flexible resolution of meritless litigation through increased judicial management. Thus, Rule 16 gives district courts discretion to convene a conference for the purpose of formulating and simplifying the issues, including "the elimination of frivolous claims ...." This provision gives federal judges increased control over litigation and empowers them to eliminate meritless allegations. See *Notes of Advisory Committee on Rule 16:*

> "Increased judicial control during the pretrial process accelerates the processing and termination of cases .... The reference in Rule 16(c)(1) to 'formulation' is intended to clarify and confirm the court's power to identify

> the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources . . . . The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment."

The powers granted by Rule 16 are supplemented by Rule 26(f), which gives the trial judge authority to curtail unnecessary pretrial proceedings; by Rule 43(c), which affords the district court flexibility in calling for information relevant to summary judgment motions; and by Rule 78, which empowers the district court to "expedite its business" by dispensing with "oral argument" on summary judgment motions.

In exercising these flexible case-management powers, this Court has declared that "[d]istrict courts must be especially alert to identify frivolous claims brought to extort nuisance settlements." *Reiter* v. *Sonotone Corp., supra,* 442 U.S. at 345. Summary procedures were designed to provide protection to parties faced with unfounded claims, as explained in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 740 (1975):

> "[E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment."

Accord, *Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation,* 90 F.R.D. 207, 230 ("Among the main reasons for the adoption of the summary judgment procedure were the goals of judicial economy and the prevention of harassment and injustice caused by long, complicated pre-trial procedures and trials in cases that were brought with insufficient evidence to support them"): *Manual for Complex Litigation (Second)* 37 (1985) (emphasizing the "vital role" that summary judgment plays in eliminating claims that do not merit a trial).



C. The potential of the federal rules to expedite judicial business will never be achieved, however, if appellate courts deprive district courts of discretion to terminate meritless litigation. Judge Schwarzer recently described the chilling effect that restrictive appellate court rulings have on summary judgment proceedings (*Summary Judgment Under The Federal Rules, supra,* 99 F.R.D. at 466-467):

> "The courts have, however, been uniquely ambivalent toward Rule 56 . . . . As a result, lawyers are uncertain about the treatment a motion will be given and about the kind of showing the court will consider sufficient to support or defeat it. Trial judges are equally uncertain about how a summary judgment will fare on appeal . . . . The chilling effect of this approach to summary judgment is reinforced by a perception that summary judgments suffer a disproportionately high rate of reversal . . . . This has contributed to the view that summary judgment is disfavored and therefore risky."

Judge Schwarzer explained that this perception by district judges has frustrated the very purpose of Rule 56 (*id.* at 467):

> "This is a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and of the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring an evidentiary trial. It has particularly unfortunate consequences in this time of high litigation costs and heavily burdened court dockets. Public demand for greater efficiency and economy, which is served by early disposition of baseless claims and defenses, is insistent and well-founded . . . . Proper use of Rule 56 is one way in which the judicial system can respond to that demand consistent with justice."

Available empirical data strongly support Judge Schwarzer's observation that summary judgment procedures have been applied with a restraint that approaches paralysis. See McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule,* 6 J. of Legal Studies 427, 452 (1977), finding that the percentage of cases resolved through summary judg-

ment amounted to only 1.5%. The author adds: "These statistics would certainly disappoint the early advocates of the summary judgment rule, who suggested that it would allow speedy disposition of a large number of cases, thus eliminating much docket congestion."

Needless to say, summary judgment is not a panacea for docket congestion. But it is an important tool for mitigating docket burdens and avoiding unnecessary litigation costs by separating frivolous from meritorious claims. The opinion of the panel majority in this case can only serve to deter effective use of this vital tool.

## II. SUMMARY JUDGMENT IS PROPERLY GRANTED BY A DISTRICT COURT ON MOTION OF A DEFENDANT OR ON THE COURT'S OWN MOTION IF THERE IS A FATAL DEFICIENCY IN THE PLAINTIFF'S EVIDENCE.

A. Judge Bork correctly recognized that the very heart of summary judgment practice is the elimination of claims which are unsupported by admissible evidence. As the draftsmen of Rule 56 explained: "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Notes of Advisory Committee on Rule 56.* In cases where there is no "genuine need for a trial," the draftsmen called for "effective utilization of the salutary device of summary judgment." *Ibid.*

In the words of Professors Wright, Miller and Kane, "the rule is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trial when no genuine issues of fact have been raised." 10 *Federal Practice and Procedure* 564-567 (1983). When there is no genuine need for a trial, the summary judgment procedure should be "viewed with favor and applied according to its terms." *Id.* at 590. Like a motion



for "directed verdict," a summary judgment motion is intended to bring the proceeding to a halt when it appears that the plaintiff possesses no admissible evidence. *Id.* at 615. Thus, while courts must take care to preserve the right to a trial on genuinely disputed factual issues, "if none appear to exist or are foreseeable, there is no reason to require a trial on the off-chance that one will develop." *Id.* at 619.

Rule 56 empowers district judges to make a searching examination of the entire record to determine if the party bearing the burden of proof at trial can adduce evidence sufficient to sustain a jury verdict. The court may examine the plaintiff's evidence *sua sponte* if it affords reasonable notice. 10A Wright, Miller and Kane, *Federal Practice and Procedure, supra,* at 27-28. "To conclude otherwise would result in unnecessary trials and would be inconsistent with the objective of Rule 56 of expediting the disposition of cases." *Id.* at 28. And in scrutinizing the record for sufficient evidence, the court may consider all of the materials submitted by both parties (*id.* at 44-46), including admissions made in briefs and in oral argument on the motion for summary judgment (*id.* at 52-54, 65-66).

These principles reflect the fundamental purpose of the summary judgment motion to quickly terminate litigation that is not supported by evidence sufficient to justify a trial. As Dean Charles E. Clark, the principal draftsman of Rule 56, stated long ago (*The Summary Judgment,* 36 Minnesota L. Rev. 567, 578 (1952)):

> "The very freedom permitted by the simplified pleadings of the modern practice is subject to abuse unless it is checked by the devices looking to the summary disclosure of the merits if the case is to continue to trial. Those are discovery, summary judgment, and pre-trial—all necessary correlatives of each other and of a system which may permit concealment of the weakness of a case in the generalized pleadings of the present day.

> Refusal of summary disposal of the case may be a real hardship on the more deserving of the litigants; since appeal does not lie from refusal, as it does from the grant, the penalties may be the severer. A court has failed in granting justice when it forces a party to an expensive trial of several weeks' duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all."

The policy considerations emphasized by Dean Clark have direct application to the case at hand.

B. In view of the cardinal purpose of Rule 56 to avoid unnecessary trials, a defendant may satisfy its burden of demonstration under Rule 56 by establishing that the plaintiff, who bears the ultimate burden of proof, cannot adduce admissible evidence on an essential element of the cause of action.

As Professors Wright, Miller and Kane have explained (10A *Federal Practice and Procedure, supra,* at 130):

> "[T]he movant may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent. If no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless and the movant therefore is entitled to a judgment as a matter of law."

A movant may make this demonstration by showing that all of the evidence the plaintiff relies upon is inadmissible. "Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless." *Id.* at 156.



Thus, as the Third Circuit recently pointed out in *In Re Japanese Electronic Products Litigation,* 723 F.2d 238, 257-259 (3d Cir. 1983), argued before this Court on other issues on November 12, 1985, No. 83-2004:

> "The term 'burden' is one that lends itself readily to confusion because it is used with different meanings in different contexts. In the Rule 56 context it does not refer to the quantum of evidence necessary to establish the existence or nonexistence of facts which as a matter of law are material .... Rather the Rule 56 inquiry is whether the admissible evidence, in the record in whatever form, from whatever source, considered in light most favorable to the respondent to the motion, fails to establish a prima facie case or defense .... Moreover, in the Rule 56 context the reference to 'burden' is not to which side has the duty to come forward with affidavits or evidence. The court may consider 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any ....' Rule 56(c) does not exclude the grant of summary judgment on the basis of materials originating entirely with the opponent of the motion."

Accordingly, where the plaintiff bears the burden of persuasion on all elements of a cause of action, the defendant may obtain summary judgment by establishing that the plaintiff's evidence, revealed through pre-trial discovery, is devoid of competent proof needed to sustain the cause of action. There is no need for the defendant to "prove the negative" with affirmative evidence of its own. See Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 Yale L. J. 745, 749-750 (1974).

C. Proper application of the foregoing principles is illustrated by two decisions of this Court. In *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253 (1968), this Court sustained a grant of summary judgment where the defendant demonstrated that the evidence relied upon by the plaintiff was insufficient to merit a trial. This Court approved summary judgment despite the plaintiff's claim that the defendant "never

disproved" plaintiff's liability theory. The Court concluded (*id.* at 289-290):

> "To the extent that [plaintiff's] burden of proof argument can be interpreted to suggest that Rule 56(e) should, in effect, . . . permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

By contrast, in *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970), this Court disapproved summary judgment where the defendant's motion did not establish a fatal deficiency in the plaintiff's evidence. In that civil rights case, the plaintiff alleged, and tendered evidence to prove, that a policeman was present in the store at the time of her expulsion, thus supporting an inference of collusion between the policeman and the store owner. The motion for summary judgment filed by the defendant did not dispute that allegation. The moving papers failed to contest the presence of the police officer, as alleged, and thus the movant did "not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store . . . and that this policeman reached an understanding with some Kress employee." *Id.* at 156-157.

Where the record materials filed in support of summary judgment show a fatal deficiency in the plaintiff's evidence, the principle announced in *Cities Service* applies, not the principle announced in *Kress*. See, *e.g.*, *Dyer* v. *MacDougall*, 201 F.2d 265, 268 (2d Cir. 1952) (L. Hand, J.), affirming summary



judgment in a defamation action where the plaintiff possessed only inadmissible "hearsay" evidence:

> "The defendants had the burden of proving that there was no such [genuine] issue [of material fact]; on the other hand, at a trial the plaintiff would have the burden of proving the [defamatory] utterances; and therefore, if the defendants on the motion succeeded in proving that the plaintiff would not have enough evidence to go to the jury on the issue, the [summary] judgment was right."

Accord, *Hubicki* v. *ACF Industries, Inc.*, 484 F.2d 519, 522 (3d Cir. 1973), affirming summary judgment based on the pleadings alone, and pointing out that "supporting affidavits are not necessary" where the plaintiff's evidence is shown to be insufficient. See also *Chambers* v. *United States*, 357 F.2d 224, 227 (8th Cir. 1966), affirming summary judgment despite the absence of affidavits in support of the motion where the plaintiff's case was shown to be deficient as a matter of law.

## III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT ON THE BASIS OF THE ENTIRE RECORD BEFORE IT.

A. The panel majority in this case did not suggest that the plaintiff was entitled to more time to uncover admissible evidence of causation. See Pet. App. 13a: "We do not hold that she should have more time." Nor did the panel suggest that Judge Bork was wrong in concluding that plaintiff possessed no competent evidence. See Pet. App. 13a: "Had Celotex properly supported its summary judgment motion, we would agree that the inadmissibility of Mrs. Catrett's evidence would be fatal to her opposition to the motion."

The sole ground for the panel's disagreement with the district court and with Judge Bork was its belief that Celotex had inadequately "supported" its motion as required by Rule

56(e). In the panel's words, the "moving papers were patently defective on their face" because there were "no affidavits, declarations or evidence of any sort" filed in support of summary judgment. Pet. App. 5a, 6a.

But as Judge Bork pointed out, the panel's reasoning overlooks the fundamental purpose of Rule 56: "I do not understand why the majority continues to focus on Celotex's motion papers and does not focus instead on the absence here of a triable, factual dispute." Pet. App. 18a n. 6. In addition, the panel's reasoning conflicts with the literal language of Rule 56.

Rule 56(b) makes it clear that the moving party "may, at any time, move with or without supporting affidavits for a summary judgment in his favor." Rule 56(c) goes on to state that summary judgment "shall be rendered forthwith" if there is "no genuine issue as to any material fact." In making that determination, the court is directed to consider "the pleadings . . . , answers to interrogatories, and admissions on file." The court is further directed to examine "the pleadings and the evidence before it" and "by interrogating counsel" to determine what material facts "are actually and in good faith controverted." Rule 56(d).

In this case, the summary judgment motion focused specifically on the pleadings and plaintiff's responses to interrogatories. J.A. 171-174. In addition, the trial judge had before it all of the record materials which the plaintiff adduced in an effort to show that there was a triable issue. *Id.* at 188-190, 195-198. Upon examination, those materials proved to be inadmissible hearsay. In relying solely on inadmissible evidence, the plaintiff in substance *admitted* that she possessed no competent evidence after nearly two years of pre-trial proceedings. This reinforced the support for a grant of summary judgment. See 6 *Moore's Federal Practice* 56-477 (1985) ("While normally the opposing papers will not aid the movant, the movant is entitled to whatever support they afford"); 10A



Wright, Miller and Kane, *Federal Practice and Procedure, supra,* 52-54 ("admissions" supporting summary judgment "may have occurred during the oral argument on the motion").

In short, the district court in this case had before it pleadings, interrogatory responses, exhibits, and admissions, all of which established that the plaintiff lacked competent evidence to support her claim. The panel was therefore in error in asserting that the motion lacked "support" as required by Rule 56(e).

The majority's departure from the text and purpose of Rule 56 is nowhere more evident than in its unwillingness to explain what deficiency it found in the moving papers. The majority admitted that Celotex was not "required to come forward with some specific form of submission" (Pet. App. 9a n. 12); it also admitted that there is "no ironclad rule that a motion for summary judgment be supported in any particular manner" (*id.* at 10a n. 15). The majority nonetheless refused to "speculate as to what showing would have been adequate to meet Celotex's burden" (*id.* at 9a n. 13). This, we submit, is a poor substitute for the specific provisions of Rule 56. The literal language of Rule 56 provides meaningful guidance to district courts. The panel majority's formulation provides no guidance at all.

B. The panel majority recognized that its holding placed a difficult burden on Celotex to "'prov[e] the negative' that plaintiff's decedent had not been exposed to its products." Pet. App. 6a. As Judge Bork noted (*id.* at 20a), this ruling "temporarily switches the plaintiff's burden of persuasion in this lawsuit to the defendant which now must prove that it could not conceivably have caused the plaintiff's injury."

The panel's ruling misconceives the movant's burden under Rule 56. All that Rule 56 requires is that the movant "persuade the trial judge that there is no triable, factual dispute

on causation." Pet. App. 20a. In a case such as this, as we have explained above, the movant sustains its burden by showing, through the discovery process, that the plaintiff possesses no admissible evidence on an essential element of her cause of action.

The notice pleading authorized by the federal rules reflects an understanding that legitimate, good faith claims would go unremedied if plaintiffs were required to demonstrate the validity of their claims prior to an opportunity for discovery. However, the drafters of the rules also recognized that notice pleading would permit the initiation of lawsuits based on claims that had no evidentiary support. If there were no device for identifying and disposing of such cases prior to trial, the modern procedural system could not function. The summary judgment device provides the glue that holds the modern pleading system together.

Summary judgment allows the court to identify those cases in which the plaintiff cannot prove an essential element of a cause of action and where, therefore, it is clear that the defendant would be entitled to a directed verdict at trial. If no reasonable jury could find for the plaintiff on an essential element of her claim, a trial would be a waste of private and judicial resources.

The majority's restrictive interpretation of Rule 56 denies the benefits of the summary judgment device to those litigants who are most in need of its protection—namely, those who are confronted with claims that have no evidentiary foundation but who cannot prove the invalidity of those claims by affirmative evidence except at exorbitant cost. For example, in the present case, unless Celotex could account for the entirety of the decedent's career, and show that he never came into contact with a Celotex product, it could never "prove the negative." The burden of persuasion on this point rests with the plaintiff precisely because the plaintiff is in the best position to produce such information. If the plaintiff has no competent evidence showing that the defendant's product caused the injury com-



plained of, there is no basis for imposing the expense and burden of litigation upon the defendant and upon society at large.

To deny a defendant summary judgment under these circumstances is to unfairly expose it to needless expense and consequent settlement extortion. Even groundless suits cost money to defend and therefore have a nuisance value if they cannot be disposed of by a speedy and inexpensive pre-trial motion. Those costs are not, of course, borne solely by the individual defendant. Ultimately, they are borne by insurers or by consumers to whom the increased costs are passed on.

C. The majority's decision would make better sense if it were supported by considerations of fairness. But it is not. The summary judgment motion in this case was not filed precipitously. The motion was filed only after many months of pre-trial discovery. And it was based on interrogatory responses showing that plaintiff had no evidence on an essential element. As Judge Bork pointed out (Pet. App. 21a):

> "Here, Mrs. Catrett has had almost two years to prepare her case for trial. The motion for summary judgment put her on notice that Celotex claimed she had no evidence of causation. Mrs. Catrett was represented by counsel who were certainly aware that the district judge could consider only admissible evidence in determining the existence of a triable factual dispute .... Counsel not only failed to produce any admissible evidence of causation but failed at the summary judgment hearing to seek additional time to produce such evidence."

In a situation like this, where the plaintiff has ample time to conduct pre-trial investigation and discovery, where the plaintiff is not surprised by the motion and has a full opportunity to meet it, and where the plaintiff does not request additional time to present admissible evidence, the trial judge acts properly in granting the motion for summary judgment on the basis of the record before him. To do less would be to abdicate the obligation of judicial management. See ABA

*Standards Relating to Trial Courts*, § 2.50 (1984): "To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation." The comment to this Section notes that "[e]radicating delay depends on adherence to this one axiom: The court must take the initiative to eliminate the causes of delay."

Reversal of the panel's decision in this case will not lead to unfair grants of summary judgment. Rule 56(f) protects opponents of summary judgment motions in those situations where it is unfair to require them to produce admissible evidence in response to a motion for summary judgment. If a plaintiff has a legitimate excuse for failing to produce evidence in response to such a motion, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just." This rule, applied by district courts in their sound discretion, is enough to protect against unfairness. See 10A Wright, Miller and Kane, *Federal Practice and Procedure, supra*, at 532. Where, however, the plaintiff has neither produced admissible evidence in response to a summary judgment motion nor attempted to justify that failure under Rule 56(f), it is not unfair to grant the motion.

The plaintiff in this case nonetheless argues (Opp. 9) that the trial judge acted unfairly because her interrogatory answers listed persons "with knowledge and facts relevant to the decedent's exposure to defendant's products" and because she intended to "call these individuals as witnesses at trial." This belated argument is unavailing for two separate reasons.

First, it is not sufficient for plaintiff's counsel to merely *assert* that some person has knowledge that supports her theory. This is not the same as tendering admissible evidence. If plaintiff really possessed admissible evidence in the form of witness testimony, she was required to comply with Rule 56(e),



which provides that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Plaintiff's conclusory argument in her brief in opposition in this Court is no substitute for such a showing. See 10A Wright, Miller and Kane, *Federal Practice and Procedure, supra*, at 156-163; *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 831 (1950) (an attorney declaration based on information and belief "does not comply with Rule 56(e)"); *Neff* v. *World Publishing Co.*, 349 F.2d 235, 253 (8th Cir. 1965) ("in determining whether summary judgment is proper statements . . . which would be inadmissible in evidence (such as statements of opinion, belief, and hearsay) must be disregarded").

Second, plaintiff never informed the district court that she was prepared to call a witness who would provide admissible testimony on the issue of causation. Nor did she seek an extension of time to tender such admissible evidence. See Pet. App. 26a-29a; J.A. 181-192. Under these circumstances, an appellate court should not consider the belated argument raised by plaintiff. See 10 Wright, Miller and Kane, *Federal Practice and Procedure, supra*, at 650-654: "The appellate court is limited in its review . . . . [I]t can consider only those papers that were before the trial court. The parties cannot add exhibits, depositions, or affidavits to support their position nor can they advance new theories or raise new issues in order to secure a reversal of the lower court's determination."

If litigants were free to raise new facts and theories on appeal from a decision granting summary judgment, litigation would become interminable. There would be no incentive to prepare a case at its pretrial phase with promptness; and trial judges could never pass on summary judgment motions with confidence that new matters would not be raised on appeal. Thus, enlargement of summary judgment records on appeal

could easily make Rule 56 a dead letter. See Pet. App. 21a n. 10.

Here, as in *First National Bank of Arizona* v. *Cities Service Co., supra,* 391 U.S. at 290, plaintiff's argument about "fairness" boils down to the mere "hope that something can be developed at trial in the way of evidence." But as in *Cities Service,* there is no occasion for a "full-dress trial" when the record before the district court shows "the absence of any significant probative evidence tending to support the complaint." *Ibid.*

## CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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